United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-1011

B
P/S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

-against-

JOSEPH MAGNANO, et al.,
Defendants-Appellants.

On Appeal From The United States District Court For The Southern District Of New York

JOINT APPENDIX FOR APPELLANTS JOSEPH MAGNANO, FRANK PALLATTA, AND RICHARD BOLELLA

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UNITED STATES COURT OF APPEALS
FILED
APR 22 1976
A. DANIEL FUSARO, CLERK
2ND CIRCUIT

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TABLE OF CONTENTS

	Page
Docket Entries	a
Indictment	A1
Charge of the Court	A11
Requests	A131
Notice of Motion for a New Trial	A136
Affidavit of Gilbert Epstein	A138
Interrogation	A146
Affidavit of Dominic F. Amorosa In Opposition	A168
Order Dated January 6, 1976	A178
Request No. 8	A181
Excerpt from Transcript of Testimony	A182
Article from N.Y.L.J. April 1973	A196

D. C. Form No. 100

CRIMINAL DOCKET

JUDGE COOPER 75 CRIM. 687

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: Dominic F. Amorosa, AUSA 791-1960
vs.	
1. JOSEPH MAGNANO, a/k/a "Joe the Grind" 1-4	
2. FRANK PALLATTA, a/k/a "Bolot", and a/k/a "Nose", 1-4	
3. RICHARD BOLELLA, 1-4	
4. LOUIS MACCHIAROLA, a/k/a "Red Hot", 1-4	
5. MICHAEL CARBONE, 1-4	For Defendant: Stokamer & Epstein
6. DOMINIC TUFARO, a/k/a "Donnie Boy", 1-4	100 Church Street, NYC 10007
7. FRANK FERRARO, a/k/a "Skooch", 1-4	962 1564 (Richard Bolella)
8. CARMINE MARGIASSO, a/k/a "Charlie", 1-4	
9. ANTHONY DeLUTRO, a/k/a "Tony West", 1-8	
10. ANTHONY SOLDANO, a/k/a "Tony", 1-9	
11. JOSEPH MALIZIA, a/k/a "Patsy Pontiac", 1-8	
12. ERNEST MALIZIA, 1	
13. FRANK CARAVELLA, 13	
14. JOHN GWYNN, 1, 10, 14, 15, 16	
15. WILLIAM CHAPMAN, a/k/a "Chappy", 1	
16. ST. JULIAN HARRISON, 1-5	
17. FRANK LUCAS, 1, 5-7	
18. GERARD CACHOIAN, a/k/a "Coco", 1-11	
19. ROBERTO RIVERA, and 1-12	
20. GABRIEL RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova", 1-17	

(07)

Fine,

Clerk,

Marsh

Attorney,

Conspiracy Count, 21

Violation, 846, 841, 812, (a)(1)(b)

Conap. to viol. Fed. Narco. Laws (Ct. 1)

Distr. & possess. w/intent to distr.

Heroin, I, & Cocaine, II. (Cts. 2-17)

(Seventeen Counts)

CASH RECEIVED AND DISBURSED

NAME	RECEIVED		DISBURSED	

12/10/75 52

DATE	PROCEEDINGS
7-10-75	Filed indictment.
7-15-75	Deft. Mangano (atty present Edward Panzer) enters plea of not guilty. Bail continued.
	Deft. Pallatta (atty present Jay Goldberg) enters plea of not guilty. Bail continued
	Deft. Bolella (atty present, Gilbert Epstein) enters plea of not guilty Bail continued.
	Deft. DeLutro (atty present) Enters plea of not guilty. Bail countinued.
	Deft. Soldano (atty present) Robert Blassner Enters plea of not guilty. Bail continued.
	Deft. Gwynn (atty present Edward D. Loughman enters plea of not guilty. Bail continued
	Deft. Chapman (atty present, Reed) Enters plea of not guilty Bail continued.
	Deft. Cachoian(atty not present) Court enters plea of not guilty. Bail continued.
	Deft. Rivera Produced on Writ (atty not present) Court enters not guilty plea

(continued on next pg)

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
	Deft. Rodriguez Bench warrant ordered Issued Trial scheduleed Sept 22 , 1975 at 1;00 P.M. .....Cooper, J.		
7-15-75	FRANK LUCAS-Filed Govt's. affidavit for a writ of habeas corpus directed to Warden, Trenton State Prison, Trenton, N.J. Writ issued, ret. 7-28-75.		
7-24-75	Filed Govt's. affidavit & notice of motion for an order sequestering jurors during the trial of this matter.		
7-28-75	Deft. Lucas (atty present) Jeffrey C. Hoffman. Pleads not guilty. Case referred to Judge Cooper. Writ satisfied.....Conner,J.		
7-30-75	ANTHONY DeLUTRO-Filed Second Offender Information.		
7-30-75	WILLIAM CHAPMAN-Filed Second Offender Information.		
7-30-75	ROBERTO RIVERA-Filed Second Offender Information.		
7-30-75	ROBERTO RIVERA-Filed Second Offender Information.		
7-30-75	FRANK LUCAS-Filed Second Offender Information.		
7-31-75	Filed MEMO ENDORSED on Govt's. motion filed 7-24-75. Application for sequestration is denied without prejudice to renewal.....Cooper,J. (mailed notice)		
7-25-75	ROBERTO RIVERA-Filed ORDER that the U.S. Marshal for the S.D.N.Y. maintain custody of the deft. in the Southern District pending the completion of the trial of the indictment.....Cooper,J.		
8-1-75	GERARD CACHOIAN-Filed Second Offender Information.		
8-1-75	FRANK LUCAS-Filed OPINION #42898 - Deft's. motion for suppression of evidence is denied.....Cooper,J. (mailed notice)		
8-13-75	FRANK LUCAS-Filed writ of habeas corpus directed to Warden, Trenton State Prison, with marshal"s return. Writ satisfied 7-28-75.....Conner,J.		

DATE	PROCEEDINGS	Date Judgment
8-19-75	ANTHONY SOLDANO-Filed deft's. affidavit & notice of motion for a bill of particulars, discovery & inspection, disclosure & for suppression of evidence, ret. 8-29-75.	
8-25-75	ANTHONY SOLDANO-Filed Govt's. affidavit in opposition to deft's. motion for a bill of particulars & discovery.	
8-21-75	Filed OPINION #42987-Defts', motions for discovery and for a bill of particulars are granted in part & denied in part. The motions of defts. Magnano and Palatta to strike a...ases are denied. Defts', Magnano, DeLutro & Palatta's motions for severance are denied. Defts', Lucas, Bolella & Palatta motion for disclosure of agent or informer is denied. Deft. Soldano's, motion to dismiss the indictment is denied.....Cooper,J. (mailed notice)	
9-3-75	FRANK LUCAS-Filed Govt's. affidavit for a writ of habeas corpus directed to Warden, Trenton State Prison. Writ issued, ret. 9-19-75.	
9-3-75	ANTHONY SOLDANO-Filed MEMO ENDORSED on deft's. motion for a bill of particulars, discovery & suppression. Motion granted in part & denied in part.....Cooper,J. (mailed notice)	
9-10-75	Filed Govt's. affidavit for a writ of habeas corpus ad test. for John Vasquez directed to Superintendent, N.Y.S. Dept. of Corrections. Writ Issued, ret. forthwith	
9-16-75	ANTHONY DeLUTRO-Filed deft's. memorandum of law. (Filed in 75 Cr. 24).	
9-16-75	ANTHONY DeLUTRO-Filed deft's. requests to charge. (Filed in 75 Cr. 24).	
9-18-75	RICHARD BOLELLA-Filed deft's. affirmation & notice of motion for discovery and for a continuance, ret. 9-22-75.	
9-24-75	WILLIAM CHAPMAN-Filed CJA Form 23 - deft's. financial affidavit.	
9-29-75	WILLIAM CHAPMAN-Filed ORDER appointing William Chance, 70 Lafayette St., N.Y.C. 10013 as attorney for deft. in this matter only.....Cooper,J.	
9-30-75	RICHARD BOLELLA-Filed Govt's. affidavit in opposition to deft's. motion for discovery and for a continuance.	
10-1-75	ANTHONY DeLUTRO-Filed ORDER granting custody to the Govt. of sealed Court authorized intercepted wire communications not to be unsealed in the absence of further order of this Court.....Cooper,J.	
10-2-75	RICHARD BOLELLA-Filed MEMO ENDORSED On deft's. motion for discovery filed 9-18-75. The within application has been rendered in its entirety by the Govt's. disclosure in open court on 9-29-75.....Cooper,J.	
10-3-75	Filed Govt's. affidavit & ORDER that John Vasquez be lodged at the Bergen County Jail and transported to and from U.S. Attorney's Office, S.D.N.Y. during the period from 10-3-75 to 10-30-75.....Duffy,J.	
10-3-75	Filed Govt's. affidavit & ORDER that Anthony Manfredonia be lodged at the Bergen County Jail and transported to and from U.S. Attorney's Office, S.D.N.Y. during the period from 10-2-75 to 10-30-75.....Duffy,J.	

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BEST COPY AVAILABLE

DATE	PROCEEDINGS	Date Order Judgment
9-22-75	Deft. Gerard Cachoian withdraws his plea of not guilty & pleads guilty to count 11 only. Govt. consents to dismiss count 1. Pre-sentence report ordered. Probation notified. Sentence - Date Open. Present bail condition continued. .....Cooper,J.	
9-22-75	Jury trial begun as to the following defts. Joseph Magnano, Frank Pallatta, Richard Bolella, Anthony DeLutro, Anthony Saldano, John Guyun, William Chapman, Roberto Rivera & Frank Lucas before Cooper,J. (Oath to jurors, voire dire).	
9-24-75	Trial continued. Jury duly empaneled & Sworn.	
9-25-75	Trial continued. Deft. Roberto Rivera withdraws his plea of not guilty (during trial) & pleads guilty to count 1 only. (Count 12 open). Pre-sentence report ordered. Probation notified. (Sentence date open). Deft. remanded in custody of U.S. Marshals.....Cooper,J.	
9-26-75	Trial continued.	
9-29-75	Trial continued.	
9-30-75	Trial continued. Deft. Lucas bail exonerated & deft. remanded.	
10-1-75	Trial continued.	
10-2-75	Trial continued.	
10-3-75	Trial continued.	
10-6-75	Trial continued. Deft. William Chapman moves to exonerate bail. Motion Granted. no opposition by the Govt.	
10-7-75	ROBERTO RIVERA-Filed deft'u. petition to enter plea of guilty with Order - guilty plea accepted.....Cooper,J.	
10-7-75	Trial continued.	
10-8-75	Trial continued.	
10-9-75	Trial continued.	
10-10-75	Trial continued.	
10-14-75	Trial continued.	
10-15-75	Trial continued. Govt. rests.	
10-16-75	Trial continued.	
10-17-75	Trial continued.	
10-20-75	Trial continued.	
10-21-75	Trial continued. All defts. rest.	
10-22-75	Trial continued.	
10-23-75	Trial continued.	
10-24-75	Trial continued & concluddd. (Special verdict as to all deft's. attached.) Jury Verdict - Deft. Joseph Magnano guilty on counts 1,2,3 & 4. (jury polled) Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Frank Pallatta guilty on counts 1,2,3 & 4 (jury polled). Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Bolella guilty on counts 1 & 4 and jury disagreement on counts 2 & 3. (jury polled). Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Anthony DeLutro guilty on counts 1 & 8 (jury polled). Pre-sentence repport ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Anthony Soldano guilty on counts 1 & 9 (jury polled) Pre-sentence report ordered. Probation notified. Deft. Remanded. Sentence 12-3-75 at 10:00 A.M.....Cooper,J.	

Cont'd. on Page #5

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Judgm
10-24-75	Jury Verdict - Deft. John Gwynn guilty on counts 1,10 & 16. Jury disagreement on counts 14 & 15. Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. remanded. .....Cooper,J. Deft. William Chapman jury disagreement on count 1 (R.O.R. .....Cooper,J. Deft. Frank Lucas guilty on counts 1,5,6 & 7 (jury polled). Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J.	
11-12-75	JOSEPH MAGNANO, et al., - Filed Order that Mr. John Bright & Ms. Sonja Johnson be allowed entrance into the Metropolitan Correctional Center during visiting hours from 12:00 noon to 3:30 p.m. & 4:30 p.m. to 6:30 p.m. for the purpose of consulting with the defts. Joseph Magnano, Frank Balatta & Richard Bolella. Cooper J. (Consented by U.S.Atty.) (mailed notice)	
11-20-75	Filed transcript of record of proceedings dated 9-22-75.	
11-25-75	RICHARD BOLLELLA, FRANK PALATTA & JOSEPH MAGNANO-Filed defts'. affidavit & notice of motion for an evidentiary hearing to determine if a new trial should be granted and for a judgment of acquittal on counts 2 & 3 as to deft. Bolella, ret. 12-3-75.	
11-26-75	ANTHONY DeLUTRO-Filed deft's. affidavit & notice of motion for a new trial and for a judgment of acquittal, ret. 12-3-75.	
12-3-75	JOHN GWYNN-Filed deft's. motion for a judgment of acquittal or alternatively for a new trial.	
12-3-75	JOHN GWYNN-Filed MEMO ENDORSED on deft's. motion filed 12-3-75. Motion denied in all respects.....Cooper,J. (mailed notice)	
12-3-75	Filed Govt's. affidavit in opposition to defts'. post trial motions for a new trial.	
12-3-75	ANTHONY DeLUTRO-Filed MEMO ENDORSED on deft's. motion for a new trial and for a judgment of acquittal, filed 11-26-75. Motion denied in all respects...Cooper,J. (mailed notice)	
12-3-75	RICHARD BOLLELLA, FRANK PALATTA & JOSEPH MAGNANO-Filed MEMO ENDORSED on defts'. motion for an evidentiary hearing & for a judgment of acquittal, filed 11-25-75. Motion denied in all respects.....Cooper,J. (mailed notice)	
12-5-75	RICHARD BOLELLA-Filed true copy of U.S.C.A. Mandate - Deft's. motion dated 10-28-75 for bail pending sentencing is denied. (mailed notice)	
12-9-75	ROBERTO RIVERA-Filed Govt's. sentencing memorandum.	
12-3-75	RICHARD BOLELLA-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS on each of counts 1 and 4 to run CONSECUTIVELY to each other. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS pursuant to Title 21, U.S. Code, Section 841 to commence upon expiration of confinement.....Cooper,J. Issued commitment 12-9-75.	

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DATE	PROCEEDINGS	Date Of Judgment
12-3-75	ANTHONY SOLDANO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on each of Counts 1 and 9 to run concurrently with each other. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS, pursuant to Title 21, U.S. Code, Section 841, to commence upon expiration of confinement.....Cooper,J. Issued commitment 12-9-75.	
12-3-75	JOSEPH MAGNANO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on Count 1. FIFTEEN (15) YEARS on Count 2 to run CONSECUTIVELY to sentence imposed on Count 1. FIFTEEN (15) YEARS on Count 3 to run concurrently with sentence on Counts 1 and 2. FIFTEEN (15) YEARS con Count 4 to run concurrently with sentence on Counts 1 and 2. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS to commence upon expiration of confinement, pursuant to (Title 21 Section 841, U.S. Code.)...Cooper,J. Issued commitment 12-10-75.	
12-3-75	FRANK PALLATTA-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on Count 1. FIFTEEN (15) YEARS on Count 2 to run CONSECUTIVELY to sentence imposed on Count 1. FIFTEEN (15) YEARS on Count 3 to run concurrently with sentence on Counts 1 and 2. FIFTEEN (15) YEARS on Count 4 to run concurrently with sentence on Counts 1 and 2. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS to commence upon expiration of confinement, pursuant to (Title 21 Section 841, U.S.Code)....Cooper,J. Issued commitment 12-10-75	
12-3-75	JOHN GWYNN-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT (8) YEARS on each of counts 1,10 and 16 to run concurrently with each other. Deft. placed on SPECIAL PAROLE for a period of THREE (3) YEARS, pursuant to Title 21, U.S.Code, Section 841, to commence upon expiration of confinement. The sentence imposed herein is to run concurrently with the state probation violation.....Cooper,J. Issued commitment 12-10-75.	
12-3-75	ANTHONY DeLUTRO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY-FIVE (25) YEARS on each of Counts 1 and 8 to run concurrently with each other. The deft. is placed on SPECIAL PAROLE for a period of SIX (6) YEARS, pursuant to Title 21, U.S. Code, Section 841, to commence upon expiration of confinement.....Cooper,J. Issued commitment 12-10-75.	
12-10-75	ANTHONY DeLUTRO-Filed deft's. affidavit & notice of motion for reduction of sentence.	
12-10-75	ANTHONY DeLUTRO-Filed deft's. notice of appeal from the judgment of conviction entered on 12-3-75. (Mailed copies to Anthony DeLutro, M.C.C., 150 Park Row, N.Y.C. 10007 and U.S. Attorney's Office).	
12-12-75	ANTHONY SOLDANO-Filed deft's. notice of appeal from the judgment of conviction entered on 12-3-75. Mailed copies to Anthony Soldano, 150 Park Row, N.Y.C.10007 and U.S. Attorney's Office.	

Cont'd. on Page #7

DATE	PROCEEDINGS	Date Ord Judgment
12-12-75	RICHARD BOLELLA, FRANK PALATTA & JOSEPH MAGNANO-Filed Defts'. notice of appeal from the judgments of conviction entered on 12-3-75. Mailed copies to Defts. at 150 Park Row, N.Y.C. 10007 and U.S. Attorney's Office.	
12-15-75	ANTHONY DeLUTRO-Filed Govt's. affidavit in opposition to deft's. motion for reduction of sentence.	
12-16-75	JOHN GWYNN-Filed deft's. notice of appeal from the judgment of conviction entered on 12-3-75. Copies mailed to John Gwynn, 150 Park Row, N.Y.C. 10007 and U.S. Attorney's Office.	
12-19-75	ANTHONY SOLDANO-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	RICHARD BOLELLA-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	JOHN GWYNN-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	ANTHONY DeLUTRO-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	FRANK PALLATTA-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	JOSEPH MAGNANO-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-29-75	RICHARD BOLLELLA-Filed Deft's. affidavit & notice of motion for bail pending appeal.	
12-29-75	JOSEPH MAGNANO & FRANK PALATTA-Filed Defts'. affidavit & notice of motion for bail pending appeal.	
01-07-76	JOSEPH MAGNANO, FRANK PALLATTA, RICHARD BOLELLA & ANTHONY DeLUTRO-Filed ORDER that Defts'. motion for a new trial based on newly discovered evidence is denied.....Cooper,J. (mailed notice)	

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO. 76-1011

UNITED STATES OF AMERICA

-vs-

FRANK LUCAS

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

CASE NO. 75 Cr. 687

JUDGE Cooper

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By E. Agnew
Deputy Clerk

3rd SUPPLEMENTAL RECORD

INDEX TO THE SUPPLEMENTAL RECORD ON APPEAL — DOCUMENTS

Certified extract of docket entries

12-29-75	JOSEPH MAGNANO & FRANK PALATTA-Filed Defts'. affidavit & notice of motion for bail pending appeal.
01-14-76	JOSEPH MAGNANO, FRANK PALATTA & RICHARD BOLELLA-Filed Govt's. affidavit in opposition to defts'. motion for bail pending appeal.
01-14-76	JOSEPH MAGNANO, FRANK PALATTA & RICHARD BOLELLA-Filed OPINION #43727 - Defts'. motions for bail pending appeal are denied in all respects.....Cooper,J. (mailed notice)
01-20-76	FRANK LUCAS-Filed Defs's. affidavit & notice of motion to recuse the Court from sentencing the deft.
01-21-76	ROBERTO RIVERA-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) years on Count 1, and to follow any and all other sentances heretofore imposed. Deft. placed on Special Parole for a period of Six (6) years, pursuant to Title 21, U.S. Code Section 841, to commence upon expiration of confinement. Count 12 is dismissed on motion of deft's. counsel with the consent of the Govt.....Cooper,J. Issued commitment 1-28-76.
01-29-76	FRANK LUCAS-Filed MEMO ENDORSED on deft's. unsigned Order to Show Cause for a stay of transfer. Oral argument held. Stay and motion denied in all respects. .....Cooper,J. (mailed notice).
01-27-76	FRANK LUCAS-Filed JUDGMENT & COMMITMENT 74/103) (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY (20) YEARS on each of counts 1 and 5 to run concurrently with each other. TWENTY (20) YEARS on each of counts 6 and 7 to run concurrently with each other. TWENTY (20) YEARS on counts 6 and 7 to run consecutively to sentence imposed on counts 1 and 5 and not concurrently. (Total sentence FORTY (40) YEARS. FINED $50,000 on each of counts 1,5,6 and 7. Fines totalling $200,000.00 are to be paid or he is otherwise discharged according to law. This is a committed fine. (1) This sentence to be in addition to, and exclusive of, any sentence now being served or to be imposed in the future. Deft. placed on special parole for a period of SIX (6) YEARS, pursuant to Title 21, U.S. Code, Section 841, to commence upon expiration of confinement.....Cooper,J. Issued commitment 1-30-76.
01-30-76	FRANK LUCAS-Filed Govt's. affidavit in opposition to deft's. motion to recuse the Court from sentencing deft.
01-30-76	FRANK LUCAS-Filed MEMO ENDORSED on deft's. motion to recuse the Court. Motion denied in toto.....Cooper,J. (mailed notice)
02-04-76	FRANK LUCAS-Filed deft's. notice of appeal from the final judgment of conviction entered on 1-27-76. Mailed notice to Frank Lucas, N.C.C., 100 Park Ave, N.Y.C.10007 and U.S. Attorney's Office.

DA:ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
JUL 10 1975
S. D. OF N. Y.

UNITED STATES OF AMERICA,

-v-

JOSEPH MAGNANO, a/k/a "Joe the Grind",
FRANK PALLATTA, a/k/a "Bolot", and a/k/a "Nose",
RICHARD BOLELLA,
LOUIS MACCHIAROLA, a/k/a "Red Hot",
MICHAEL CARBONE,
DOMINIC TUFARO, a/k/a "Donnie Boy",
FRANK FERRARO, a/k/a "Skooch",
CARMINE MARGIASSO, a/k/a "Charlie",
ANTHONY DeLUTRO, a/k/a "Tony West",
ANTHONY SOLDANO, a/k/a "Tony",
JOSEPH MALIZIA, a/k/a "Patsy Pontiac",
ERNEST MALIZIA,
FRANK CARAVELLA,
JOHN GWYNN,
WILLIAM CHAPMAN, a/k/a "Chappy",
ST. JULIAN HARRISON,
FRANK LUCAS,
GERARD CACHOIAN, a/k/a "Coco",
ROBERTO RIVERA, and
GABRIEL RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova",

Defendants.

75 CRIM. 687

INDICTMENT

S 75 Cr.

The Grand Jury charges:

From on or about the 1st day of January, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA a/k/a "Bolot", a/k/a "Nose", RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch", CARMINE MARGIASSO a/k/a "Charlie", ANTHONY DeLUTRO a/k/a "Tony West", ANTHONY SOLDANO a/k/a "Tony", JOSEPH MALIZIA a/k/a "Patsy Pontiac", ERNEST MALIZIA, JOHN GWYNN, WILLIAM CHAPMAN a/k/a "Chappy", ST. JULIAN HARRISON, FRANK LUCAS, GERARD CACHOIAN a/k/a "Coco", ROBERTO RIVERA, and GABRIEL RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova", the defendants, and Frank Caravella, Alex Pulphus, Joseph Condella, Jose Ramos, Mario Perna, and Anthony Verzino, named herein as co-conspirators but not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and

MICROFILM
JUL 10 1975

A1

DA:ko

agree together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the conspiracy and to effect the objects thereof the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about February 1973 defendant ERNEST MALIZIA met co-conspirator Mario Perna at the Evergreen Bar at 4905 Fifth Ave., Brooklyn, New York and had a conversation.

2. In or about February 1973 defendants ERNEST MALIZIA and FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", met in the Bronx, New York and rode in an automobile.

3. In or about March 1973 defendant FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", met defendant ERNEST MALIZIA and co-conspirator Mario Perna at the Raceway Diner in Yonkers, New York and discussed narcotics.

4. In or about March 1973 defendant FRANK FERRARO a/k/a "Skooch" delivered a package containing approximately 2 kilograms of heroin to defendant ERNEST MALIZIA and co-conspirator Mario Perna on Allerton Avenue, Bronx, New York.

5. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately one-quarter kilogram of heroin to defendant JOHN GWYNN.

6. In or about March, 1973 defendant WILLIAM CHAPMAN a/k/a "Chappy" introduced co-conspirator Mario Perna and defendant ERNEST MALIZIA to defendant ST. JULIAN HARRISON

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7. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna paid approximately $20,000 to defendants DOMINIC TUFARO a/k/a "Donnie Boy", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", and FRANK FERRARO a/k/a "S[illegible]".

8. In or about March, 1973 co-conspirator Mario Perna and defendant ERNEST MALIZIA received a package containing approximately 4 kilograms of heroin from FRANK FERRARO a/k/a "Skooch".

9. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately 3 kilograms of heroin to defendant ST. JULIAN HARRISON.

10. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna paid defendants JOSEPH MAGNANO a/k/a "Joe the Grind", DOMINIC TUFARO a/k/a "Donnie Boy", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", and FRANK FERRARO a/k/a "Skooch" approximately $20,000.

11. In or about April 1973 defendant FRANK LUCAS paid co-conspirator Mario Perna and defendant ERNEST MALIZIA approximately $56,000.

12. In or about April, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately one-eighth kilogram of heroin to defendant GERARD CACHOLAN a/k/a "Coco".

13. In or about September, 1973 co-conspirators Mario Perna and Anthony Verzino and defendant ERNEST MALIZIA met and had a conversation.

14. In or about September, 1973 defendant GERARD CACHOLAN a/k/a "Coco" introduced defendant ROBERTO RIVERA to co-conspirator Mario Perna and defendant ERNEST MALIZIA.

15. In or about September, 1973 co-conspirator Mario Perna delivered a package containing approximately two kilograms of heroin to defendant ROBERTO RIVERA at the Pathmark Shopping Center near Bruckner Boulevard and White Plains Road, Bronx, New York.

16. In or about October, 1973 defendant RICHARD BOLELLA met co-conspirator Mario Perna and had a discussion about reducing the price being paid for the heroin.

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17. In or about November 1973 defendants FRANK FERRARO a/k/a "Skooch" and CARMINE MARGIASSO a/k/a "Charlie" delivered a package containing approximately 12 kilograms of heroin to co-conspirator Mario Perna at the Cross County Shopping Center, Yonkers, New York.

18. In or about November, 1973 defendant ANTHONY DeLUTRO a/k/a "Tony West" delivered a package containing approximately 5 kilograms of heroin to co-conspirator Anthony Verzino.

19. On or about December 1st, 1973 co-conspirator Mario Perna and defendant ERNEST MALIZIA delivered a package containing approximately 10 kilograms of heroin to defendant FRANK LUCAS at the Van Cortlandt Motel, Bronx, New York.

20. In or about November, 1973 co-conspirator Anthony Verzino paid defendant ANTHONY DeLUTRO a/k/a "Tony West" approximately $250,000 in two installments.

21. In or about January 1974 defendant ANTHONY SOLDANO a/k/a "Tony", delivered a package containing approximately 3 kilograms of heroin to co-conspirator Anthony Verzino in Queens, New York.

22. On or about January 15, 1974, defendant JOHN GWYNN distributed approximately 148.5 grams of heroin in or near Apartment 5C, 1065 Jerome Avenue, Bronx, New York.

23. On or about February 25, 1974 co-conspirators Frank Caravella and Anthony Verzino possessed approximately 26 pounds of heroin at 1130 Pelham Parkway, Bronx, New York.

24. On or about January 28, 1975, the defendant FRANK LUCAS possessed approximately $584,705 in cash at 933 Sheffield Road, Teaneck, New Jersey.

(Title 21 United States Code, Section 846.)

A4

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SECOND COUNT

The Grand Jury further charges:

In or about March 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", RICHARD BELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch", and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 2 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

THIRD COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", RICHARD BOLLELA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy" FRANK FERRARO a/k/a "Skooch" and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 4 kilograms of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

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FOURTH COUNT

The Grand Jury further charges:

In or about November, 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolo", a/k/a "Nose", RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch" and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 12 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

FIFTH COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, ST. JULIAN HARRISON and FRANK LUCAS the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

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SIXTH COUNT

The Grand Jury further charges:

In or about October, 1973 in the Southern District of New York, FRANK LUCAS the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute Schedule I and II narcotic drug controlled substances, to wit, approximately 4 kilograms of heroin and 2 kilograms of cocaine.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A)

SEVENTH COUNT

The Grand Jury further charges:

On or about the 1st day of December, 1973 in the Southern District of New York, FRANK LUCAS the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 10 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

EIGHTH COUNT

The Grand Jury further charges:

In or about November, 1973 in the Southern District of New York, ANTHONY DeLUTRO a/k/a "Tony West", the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 5 kilograms of heroin

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A).)

NINTH COUNT

The Grand Jury further charges:

In or about January, 1974 in the Southern District of New York, defendants ANTHONY SOLDANO a/k/a "Tony", and JOSEPH MALIZIA a/k/a "Patsy Pontiac" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A) Title 18, United States Code, Section 2.)

TENTH COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, JOHNNY GWYNN the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

ELEVENTH COUNT

The Grand Jury further charges:

In or about April, 1973 in the Southern District of New York, GERARD CACHOIAN a/k/a "Coco" the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

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TWELFTH COUNT

The Grand Jury further charges:

In or about September, 1973 in the Southern District of New York, ROBERTO RIVERA the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

THIRTEENTH COUNT

The Grand Jury further charges:

In or about December 1973 in the Southern District of New York FRANK CARAVELLA the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

FOURTEENTH COUNT

The Grand Jury further charges:

On or about October 30, 1973, in the Southern District of New York, the defendant, JOHN GWYNN, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, 159.5 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18 United States Code, Section 2.)

A-1

FIFTEENTH COUNT

The Grand Jury further charges:

On or about the 20th day of December, 1973, in the Southern District of New York JOHN GWYNN, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, 151.5 grams of cocaine.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

SIXTEENTH COUNT

The Grand Jury further charges:

On or about the 15th day of January, 1974 in the Southern District of New York, JOHN GWYNN, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, 148.5 grams of heroin.

(Title 21, United States Code, Section 812 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

SEVENTEENTH COUNT

The Grand Jury further charges:

In or about March 1971, in the Southern District of New York, GABRIEL RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova", the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 1/8 kilogram of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A).

W. M. Dove
Foreman

Paul J. Curran
PAUL J. CURRAN
United States Attorney

A16

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MD 2-1

CHARGE OF THE COURT

THE COURT: Madam Forelady, Ladies and Gentlemen of the Jury: I would be sadly remiss if I failed at the very outset of this, the Court's charge to the jury, to express to each one of you a keen satisfaction that comes to the Court and to counsel for the undivided attention that you have constantly demonstrated throughout the course of this trial.

It is evident that you have discharged your duty with fidelity. You have followed the testimony with intelligent understanding and absorbing interest. I am quite satisfied that no single matter relating to the factual issues has escaped your attention.

You have been silent throughout and when your turn comes to speak I have every confidence, and I am sure counsel on both sides join me in this, that in accordance with the solemnity of your oath and the high order of your conscience, you will pronounce the justice due in this case.

Your selection was the result of great care exercised by the Court and counsel. Your mission is not easy, and we are sure you did not expect it to be.

A distinguished philosopher, Albert Camus, a Nobel prize winner, summed it up for all of us -- for you,

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MD T2-2

for the Judge, for counsel -- when he wrote that justice dies from the moment it becomes a comfort, when it ceases to be a burning reality, a demand upon one's self.

We are indebted to counsel, Mr. Amorosa and Mr. Virella for the government, and, in alphabetical order, Mr. Blossner, Mr. Chance, Mr. Epstein, Mr. Goldberg, Mr. Hoffman, Mr. Lang, Mr. Edward Panzer, Mr. Joseph Panzer and his associate Mrs. Oberman, for the defense, for their genuine concern with the interests of their clients. In particular, we are grateful for their demonstration that a day's work well done is always a stimulating experience for participants and listeners alike.

The lawyers are not on trial. They have acquitted themselves with distinction. The evidence and the law applicable to that evidence is what is before you, and you will address yourselves exclusively to that. Whether you like a lawyer or you don't like a lawyer, whether you like the Judge or you don't like the Judge, hasn't a blessed thing to do with your undertaking.

Let me say a word about objections that counsel have interposed from time to time. Please understand that counsel under our law not only have the right but it is indeed their duty on the offer of certain evidence to press whatever legal objections there may be to its admission.

A12

T2-3

With those comments about counsel, we take leave of them and we concern ourselves exclusively with the parties involved in this controversy: the government, otherwise known in the law as the plaintiff in this proceeding, and each defendant on the other side.

This is not a contest in salesmanship, it isn't a battle of wits, it isn't a clash of personalities; it is by law pronounced to be a conscientious search for the truth, and if you can leave this courthouse with the firm conviction that your verdict is consistent with the truth, then indeed your duty will have been done, because the only triumph in any litigated case, whether it be civil or criminal, is the triumph of the truth.

As I told you when you were being selected, every defendant -- every defendant, regardless of his race, creed, color, age, regardless of impediments of any kind -- is entitled to a fair trial under our law, and the very same legal propositions of law must be charged by the Court to the jury regardless of who the defendant is, whether he is successful or waiting for success, whether he is ignorant or well informed, crude or polished, highly esteemed or despised, whether he is a member of a good or bad family, yes, even the avowed enemy of our society, each is entitled to his day in court and let justice be done according to the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

T2-4

facts and according to the law in the case. That is America.

You do not sit here as barons of old, who we used to read about as schoolchildren, the barons who assembled and by whim, favor or caprice, by likes or dislikes, decided who was going to be flung into jail and who went free and who got the bag of gold or who was compelled to resign in abject poverty.

You have no such power, any more than I have. Your duty is to be the judges of the facts and apply the law to the facts no matter who likes it or who doesn't like it, and let the chips fall where they may. You are here to determine the guilt or innocence of each of these defendants separately.

Neither you nor I are here to please or favor anyone. We have a sworn duty to perform and must discharge it if justice is to prevail. After all, it is your justice, your courthouse, for black, for white, for poor, for rich, It is your burden as much as my burden, and you have got to get exercised about the doing of justice as much as the Judge.

We have reached the point where you are soon to undertake your final function as jurors, and here you perform one of the most sacred obligations and responsibilities

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. - 791-1020

T2-5

of citizenship. You are, and make no mistake about it, the ministers of justice, as the Supreme Court of the United States has referred to you. You are to approach your duties in an attitude of complete fairness, complete impartiality, and to appraise the evidence calmly and deliberately, and, as was emphasized by me when you were being selected, without the slightest trace of sympathy, bias, or prejudice for or against the government or the defendants who are the only parties to this controversy.

What I have just said is as important a part of this charge by the Court as any other part. Never forget it for an instant, that you and you alone are the sole and exclusive judges of the facts.

Its equivalent is found when it comes to law where the Judge is the sole and exclusive judge of the law. You heard counsel press various legal points before me and when I disagreed you heard me take a definite position. And if I agreed, I said so. You do likewise as to the facts no matter who it suits.

I think I mentioned to you while you were being selected -- and this, too, is a part of America -- that like legions of others I have been on my own since I was ten, and I have lived on both sides of the tracks. I have frozen and gone hungry, and we were moving every month because we

MD2-6

couldn't pay the rent, and I went down to the railroad tracks and with cupped hands, because we couldn't afford gloves, in wintertime I picked up the pieces of coal that fell from the passing railroad cars and brought those pieces home to feed the potbellied stove.

Don't tell me what it means to go from rung to rung, and the blessedness of this country in affording an opportunity to those who want to climb, climb the legal way, the approved way. And I learned from early days up to this very moment something that many of us forget.

Let us be satisfied with the applause of our own conscience. I don't want anybody bugling and bowing and scraping before me. I want this little man up here to be satisfied and approve of what I endeavor to do. And that I have a right to insist upon from you, as the judges of the facts, every bit as vital and every bit as important as my function.

You didn't see me sit in a high position and look down on you. Don't let anybody fool you. Your function equals if not exceeds mine because you, not the Judge, decide whether there were these conversations, whether there was this participation, whether this took place or that took place. I don't decide it; you decide it. That's the reason you must be satisfied with the applause of your own

A16

MD2-7

consciences.

One of the greatest judges that ever sat in the Supreme Court, Mr. Justice Robert Jackson from New York -- and this is a part of the history of that Court -- I got to know him, and one of the greatest regrets of my life is that it didn't come to me to have the privilege of really knowing him more intimately -- he was a great judge. Why? Because he knew the books? No. He knew the books, but much more he knew human beings, he knew life. And as Justice Holmes commented once: "The life of the law is not logic, it is experience."

That was true of Mr. Justice Robert Jackson, who you remember was the prosecutor on behalf of the United States at the Nuremberg trial. Justice Jackson, who is no longer among the living, attended a meeting of attorneys and judges, and during the intermission a group of admiring lawyers gathered around him, and one of them spoke up and said, "Mr. Justice, what do you really expect of a judge?"

And without batting an eye, he said: "I expect him to do his utmost to call them as he sees them as they come across the plate, just the way that umpire is doing at that game going on right now over there."

And if that is true of a judge of the law, it is equally true of you, the judges of the facts. You call

MD 2-8

them as you see them. We have a game going on right now. One of the sacrifices of all of us was not to have been able to be spectators on television. What does that game mean? Would it mean that much to us if it weren't played on a clean field? Not a physically clean field. If there was the slightest bit of doubt as to the honesty of the play, and the calling of the play, we would scream our heads off and we would tear at it with our nails.

How much different is it here? It is the same. If this is nothing more than an idle performance, well, then, God help us all. It is a jungle, that's what it will be, and that's what a lot would like to turn it into. I think it is worthwhile, as American citizens, and especially as we approach the two hundredth birthday, to reflect on these points that are a part of the law in this case.

Just imagine where in the whole civilized world will you find what I am about to recite? Only true in America that when the government comes in, the United States Government, with all its power, coming in on behalf of the people of the United States, when it comes into a courtroom our law is that it has no advantage whatever, it is just another litigant, and it is actually called the plaintiff in the law.

The powerful United States of America comes into

MD 2-9

court and starts the contest right at the same mark with the defendant. How do you like that?

In every country of the world almost as soon as a case is started the government is already on second base before a word has been uttered. Those who tear at the vitals of America, do they know that proposition of law, do they know the bloody pages of history that it took to bring this into being? We point with pride to it.

And so the fact that the United States Government comes into this courtroom and levels a charge on behalf of the people against each one of these eight defendants now before us, the government starts just where each one of the defendants starts. It has no advantage whatever, but it is entitled to no less consideration than each of the defendants.

Please bear in mind that every word of the Court's charge applies to each defendant separately, for the simple reason that I emphasized to you when you were being selected, that guilt is personal. You must find each defendant guilty or not guilty on each of the thirteen counts that confront you, which I hope to develop, and which, if you are patient with me, I shall make you understand so well that you will be ready to undertake a written examination. Otherwise I have failed, because you have to

A17

MD 2-10

apply that law, not some of it but every bit of it, and it is my obligation to get it across.

I can give you some mumbo-jumbo, too; I can give you some fancy language that those of you with your degrees may be able to fathom upon a first reading, but what about someone else on that jury equal to you who hasn't had any formal training? And so it is my purpose to break these propositions down so that each one of the twelve jurors will know it backwards and forwards.

As you know, I just mentioned that there are thirteen separate counts. What does that mean? There was a day when if you charged thirteen separate crimes you would have to have thirteen separate indictments. But in recent years the lawmakers and the jawgivers have said, "Cut out the nonsense. If you've got something to say against a man, say it in one piece of paper, and say it in clear, simple language, and not a lot of uncertainties. Let anybody with an ordinary education read it and understand it."

And so each one of these thirteen counts against these eight defendants on trial is a separate crime charged, and each count, therefore, each charge, must be weighed separately.

You look at the total evidence. You apply the law to that evidence. Then you ask yourself, "On the basis

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md2-11

of all the evidence against this particular defendant No. 1, am I satisfied of his guilt on the facts and according to the law given us by the Judge?"

Regardless of whether two, three, four or five defendants are guilty or innocent, you must weigh the total trial record, all the evidence, against each one.

I use the expression "tote it up" -- t-o-t-e -- a good old English word meaning add it up. Add up every piece of evidence against each one and ask yourself: "Am I satisfied on those facts relating to that particular defendant and on the law given us by the Judge applicable to that total evidence against that particular defendant -- am I satisfied of his guilt beyond a reasonable doubt?" Which I shall shortly define for you.

The law has said the jurors carefully selected have the capacity to separate the totality of the evidence and to apply the evidence as to its weight and apply it to each defendant separately and distinctly. We say with great pride, and we mean it, that all parties, government and individuals alike, stand equal before the bar of justice. Your final role is to decide the fact issues that are in this case. You and only you, not the Judge, not counsel, are the exclusive judges of the facts. You and you alone pass upon the weight of the evidence. You and no one but

MD2-13

you determine the believability or the credibility of each witness. You and no one but you resolve such conflicts as there may be in the testimony of witnesses. And you and only you, the jury, draw such reasonable inferences as may be warranted by the evidence.

It is for you, the jury, yes, the jury only, to make an independent, objective, detached assessment of the total evidence. I venture the suggestion that with all the sincerity in the world even the advocates on either side of the table cannot do that completely, for the interests of their respective clients are bound to rub off onto them, even subconsciously.

So you see why the law names you, the jury, and you alone, to pronounce the last word, so to speak, on what the total trial record points to as the guilt or innocence of each defendant on trial before you.

See how imperative it is that you take the law exclusively from the Judge presiding. Without meaning to mislead you many of counsel for the defense during summation emphasized the point that the case presents no corroboration of the testimony of Perna and Verzino. Some of the attorneys actually used the words "no corroboration."

Well, under the law no corroboration is necessary. To argue that the testimony of Perna and

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. -- 791-1020

MD 2-14

Verzino is unworthy of belief, and that there is no credible or believable evidence supportive of their testimony, is one thing, but to insist that there must be or should be supportive or corroborative testimony is to add a requirement not countenanced by law.

Or take this example. Counsel have emphasized the corruptability of Perna and Verzino, and well they might. However, you do not consider the testimony of Perna and Verzino in isolation or in vacuum, as it were. It is to be estimated, assessed, and evaluated in conjunction with all the other evidence in the case, including the testimony of the two defendants who took the stand.

The testimony of Perna and Verzino then is to be considered in conjunction with the entire trial record, all the evidence, all the other witnesses, all the stipulations -- and they are important, those stipulations, because they embody proof, evidence -- and all the exhibits, and each of the concessions made throughout the entire trial.

Here's another example. One or two attorneys during summation advanced the thought that the $585,000, approximately, in cash found, along with drugs and other materials, in the presence of defendant Lucas, and received and marked in evidence, is not binding on any other

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

defendant. It is not as easy as that. I shall develop that later. But for the present let me comment if there actually was a conspiracy, and you so find, and a defendant before you other than Lucas was a willing and knowing member of that particular conspiracy, and further you are convinced that all the cash, or a part of it, and the other materials, were under all the facts and circumstances related to the objective of the conspiracy, that cash and the other materials are as binding on that other defendant as though they were actually found on him or in the premises occupied by him.

After all, there is nothing unusual about the end product of any illegal enterprise. The financial return is the be all and end all of the undertaking. Even when playing a game there comes a time when someone picks up the marbles.

So that's the reason why you pay attention to the law given to you by the Judge, not to well-meaning remarks that might lead you astray. And I rush in to say there was no such intent on the part of any counsel.

This may surprise you, but as a trial judge in the United States District Court I have a perfect right to comment on the evidence. That is unlike what you have heard in the state court. I have the power, if I wish to

MD 2-16

use it, in any case, civil or criminal, to say to a jury, after telling them what their powers are, that in my opinion Witness X, who took the stand, was nothing but a corrupt liar, and I wouldn't believe him on a stack of bibles from the floor to the ceiling. All I need to do is add "But you are not bound by my estimate; you are the judges of the facts." "

Or I can say of another witness: "In my opinion that witness spoke the gospel truth. But you, the jury, are not bound by my estimate."

I can tell you how I feel about the facts. I can comment on them openly, distinctly pointing out, however, that you and you alone are the judges of the facts.

I shall do no such thing, and I never have. I don't believe that I should praise you, do you honor, rise when you come in -- and why do I do that? As a sign of respect for the enormity of the burden that you carry -- I don't believe that I should praise you, do you honor, speak of you as the ministers of justice, and then invade the orbit of your function. To me, that is talking out of both sides of one's mouth. That is your responsibility and you are going to have to meet it, and I have no doubt that you will.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

What more can a judge say than what I told you when you were being selected, that the fact-finding function often proves more burdensome than laying down the law. I know, for the greater part of my own life has been spent as a fact finder.

Since I have the power to talk about the evidence and even give you my evaluation of it, I distinctly forbid you from reading into the tone of my voice or the emphasis that I may apply here or there to a proposition of law how the Judge feels about the facts. If I wanted to tell you, I would tell you outright, since I have a perfect right to do it.

I have long fought for the proposition that if you've got something you believe in you go up the front way, don't go sneaking around the back. So that if I wanted to tell you my impression of some of the evidence, I'd come right up the front way, because I've got the power to do it. I don't have to resort to innuendo.

I want to rush in and say don't you dare try to spell out how the Judge feels about any fact by the tone of my voice or the way I move about. My function is to instruct you as to the law, and it is your sworn duty -- you will remember I emphasized it while you were being selected -- to apply the law as I state it to you in these

MD 2-18

instructions and apply it to the facts as you, the jury, find them to be.

Your oath compels you to apply the law regardless of your personal opinion as to the wisdom or the rightness of any part of the law. I emphasized that when you were beling selected.

I speak very plainly when I tell you that your oath compels you to apply the law as laid down in these instructions. It is unthinkable that a jury would do otherwise, for that would be the same as a lawyer violating his oath, for which he could be disbarred, or a judge violating his oath, for which he could be removed from judicial office.

You must never forget that you sit here as American ministers of justice compelled by your oath and your conscience to determine the guilt or innocence of each of these defendants based exclusively on the total trial record before you.

What do we mean by the total trial record? The sworn testimony, the exhibits, the stipulations entered into by both sides, and the instructions of the Court.

Now, with regard to any fact matter it is your recollection and yours alone that governs, not what counsel remember or anything that I may comment on. Anything that

MD 2-19

counsel either for the government or for the defense may have said with respect to matters in evidence, whether during the trial or in a question or in an argument or in summation, is not to be substituted for your own recollection of the evidence, and so anything that I may refer to, if my recollection doesn't accord with yours, your recollection prevails, your recollection is paramount.

Before we consider each charge against each defendant and what is required to sustain each charge against each defendant, there are certain preliminary observations that are in order, certain principles of law that are applicable to every criminal case, and to some of which I referred at the time of your selection as jurors.

Such is human nature that people apply the term boilerplate to these fundamental principles of law which have been hammered out by blood and sweat and are a part, and a glorious part, of our country's judicial history. They are not boilerplate to me. I have said them hundreds of times, and on each occasion I regard myself privileged to pronounce these sacred propositions of law.

One of them is that an indictment is merely an accusation, a charge. It is a method by which persons accused by a grand jury of crimes are brought into court,

MD 2-20

and their guilt or innocence is determined by a trial jury, such as you are. It is no evidence whatever of guilt of a defendant and you will not give any weight whatsoever to the fact that an indictment has been returned against these defendants.

Each defendant here has pleaded not guilty. Each defendant had a right to plead not guilty and the government under our law has the burden of proving guilt beyond a reasonable doubt, which I shall shortly define, as I shall other terms that I use.

We say under our law that the government has the burden of proving each charge, each count, against each defendant, and proving each count as to each defendant beyond a reasonable doubt.

Now, when I say that, that doesn't mean to imply that I think the government has not done so or that the government has succeeded. I have got to lay down these principles of law firmly, and you, the jury, apply those propositions of law to the facts as you find them to be. Remember, I take no position here on the facts.

After all, ladies and gentlemen of the jury, what does the word "instructions" by the Judge mean? The law says the Judge has to instruct you. Does it mean to give you some phrascology and some legal terms which fall on your

MD 2-21

ears for the first time and leave you troubled and uncertain? Not at all. It means teach the jury, somehow convey to the jury the essence, the substance, the purport and the directive of each proposition of law applicable in the case.

Just contemplate the glory of our law when it comes to the presumption of innocence, which I mentioned with a great deal of emphasis while you were being selected. I told you that the burden is on the government to prove a person guilty and to prove that person guilty beyond a reasonable doubt, and that burden never shifts from the government to a defendant. The government has to bear that burden throughout the entire trial from beginning to end, from start to finish.

It is our law that a defendant doesn't have to prove his innocence. On the contrary, the defendant is presumed to be innocent of the accusation contained in the indictment. This goes back to the time when men were put on the rack and tormented and tortured and made to give utterances that condemned them to death. And so the very purport and the very sinew of the Constitution of the United States in essence is this: That based on the history of mankind no man shall be made to testify against himself, no man shall have to prove his innocence. If you've got something against

MD 2-22

a man and you charge him, then you prove it, and prove it beyond a reasonable doubt.

If that isn't the glory of a civilized world, tell me what it is. The fact that it isn't upheld and glorified and hammered by those who have the mission to hammer it, and to make it a viable, everyday, tangible concept translated into living performance is not my fault, but that's the law.

And so each of these defendants is presumed to be innocent of each of the charges. That is the law.

The government, of course, says the government is well aware of that presumption. The government is saying to us, in effect, that "We do not evade it, we say that what we have offered as proof establishes the guilt without in any way interfering with that tremendous advantage which the law recognizes that each defendant has, to wit, the presumption of innocence."

So, let's go back. It is a protective shield which covers a defendant. And when I say a defendant I mean each of these defendants, and each of the defendants in the cases I had twenty years ago, and each of the defendants that I will have as long as I draw a breath. And that presumption is in favor of a defendant throughout the entire trial. It is in favor of each of these defendants right now as I

talk to you. This very moment our law says that shield of presumption of innocence surrounds each defendant during the course of the entire trial. It even continues to shield him while you are deliberating.

It is removed, this presumption of innocence of a defendant, this shield, only when you, the jurors, declare that the guilt has been established beyond a reasonable doubt. Then that protective shield has been pierced, it falls away from the defendant and it no longer affords him protection.

The presumption of innocence is sufficient to acquit a defendant of the crime charged against him unless it is overcome by evidence that satisfies your mind beyond a reasonable doubt of his guilt, and unless you are so satisfied it is your sworn duty to find the defendant not guilty.

If, on the other hand, you do not have a reasonable doubt as to his guilt it is your sworn obligation to find the defendant guilty.

Now, let's go to reasonable doubt. There is no mystery about it. An intelligent high school student can capture its full essence. What does the law mean by reasonable doubt? How much evidence does the government have to place before a jury in any criminal case? Must it

MD 2-24

be evidence beyond any possible doubt? Absolutely not. The words are reasonable doubt, and they mean that there is a doubt founded in reason, not imaginary, but founded in reason, and arising out of the nature of the evidence in the case or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence. It means a doubt that is substantial and not shadowy. A reasonable doubt is a fair doubt, a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.

A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persuasiveness.

Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant or a desire to uphold the government. If after a careful and impartial consideration of all the evidence in the case from start to finish you can candidly and honestly say that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of his guilt which amounts to a moral certainty, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

MD 2-25

On the other hand, if after such a fair and impartial consideration you can candidly and honestly say that you are satisfied of the guilt of a defendant, that you do have an abiding conviction of his guilt which amounts to a moral certainty -- I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives -- then you have no reasonable doubt, and in that circumstance it is your sworn obligation to convict.

One final word on this subject of reasonable doubt. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. This is not a mathematical problem. You are dealing with human beings, the flesh, the bone, the tissue. If the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty. And so, in consequence, the test in a criminal case is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Let's take a bird's eye view of the indictment. I will try to delineate essential parts of that at the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. - 791-1020

appropriate times.

The indictment in this case contains seventeen counts, as I told you. You will be asked in your deliberations to consider only the following counts. You will get a list of them, don't worry about it. It will be all typed up for you.

One, the conspiracy count. That's the first count, in which all of these defendants are named as participants.

And then there are what we call substantive counts: 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15 and 16. Each of these counts charges a separate offense or crime, and each must be considered separately.

The indictment names twenty defendants in all, and five additional co-conspirators. Only eight defendants are on trial before you. They are the only persons whose guilt or innocence you must announce in your verdict, although, as I will explain to you shortly, in considering their guilt or innocence you may have to determine the nature of the participation, if any, of the other named defendants.

I repeat: In the determination of innocence or guilt you must bear in mind that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately with respect to him and solely on the

MD 2=27

evidence presented against him, or the lack of evidence.

The case of each defendant stands or falls upon the proof or lack of proof of the charge against him, and not against somebody else.

Now, what are all these charges? Reduced to its simplest term, here's what it amounts to. I told you the first count charges a conspiracy. It charges that all of the defendants together and with others known and unknown to the grand jury conspired to violate the narcotics law. This is called a conspiracy count.

I'll tell you in a bit what we mean by a conspiracy, what the law means. A word just now will help you. It is a plan of two or more people to violate a federal law. That is, in brief, what it amounts to. "Let's get together and agree and become willing and knowing members of an agreement between us to violate the narcotics law." That's it. To do that alone is a conspiracy, as I shall define conspiracy, and that's a separate crime from going out and possessing the drugs.

"Let's get together and take stolen property across state lines. What do you say?

"Okay."

There is a plan to commit a federal crime, which is the illegal transportation of certain properties across

MD 2-28

state lines.

"Let's get together and avoid the payment of a tax on beer.

"Okay, count me in."

If all the elements that I will define shortly are present, if they are brought to the attention of the jury by proof beyond a reasonable doubt, that alone is a conspiracy. And if they go and transport that liquor or that beer without tax, that's a separate crime.

Am I getting through a bit? Stay with me, and I'll drive it home.

Now, the remaining counts are what we call substantive counts.

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So these remaining counts are the substantive counts. The conspiracy count here charges that they got together to violate the federal law with regard to the possession of drugs, and the substantive counts charge that they did exactly that, that they did carry out the objectives of the conspiracy, and that is, actually possess with intent to distribute narcotic drugs.

So 1 charges the conspiracy, even though they did not have a bit of drugs, and possession the forbidden drug with intent, knowing, et cetera, et cetera, that is a separate charge.

Do you get it, madam?

And so these substantive counts charge violations of the federal narcotics law in that the defendants named in each count are accused of distributing and possessing with intent to distribute various amounts of heroin and cocaine. I shall go into each count separately.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which is the objective of the conspiracy. Theessence of the crime of conspiracy is an agreement or undertaking to violate other laws. So if a conspiracy exists, even if it should fail of its purpose, it is still punishable as a crime. Consequently, in a conspiracy charge there

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is no need to prove an actual violation of the narcotics laws. Just getting together and planning it, that is a crime.

Now, let's go right to it -- and bear with me and see if I can't make this clear. A lot of people have difficulty with conspiracy. And I think if you stay with me we will bring it home to you. I have already told you that the conspiracy count is distinct from the charges made in the remaining counts. This fact, however, does not preclude you from considering proof of an actual violation as evidence that a conspiracy existed. Before you may convict any of the defendants under this count, the following essential elements must be established beyond a reasonable doubt:

First: You must find the existence of the conspiracy charged;

Second: You must find that the particular defendant whose guilt or innocence you are considering knowingly and wilfully associated himself with the conspiracy; and, finally,

Third: You must find that one of the conspirators committed at least one of the overt acts set forth in the indictment at or about the time and place alleged. I shall presently refer to the overt acts.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

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If the government fails to establish each essential element beyond a reasonable doubt, you must acquit the defendant on this count; if it succeeds, your duty is to convict him on this count.

Let me give you a crude example of an overt act: A says to B, "I have decided I am going to rob that bank down the street," and B says, "When are you going to do it?"

And A said, "I don't know, but I am figuring on doing it soon."

And B says, "What's wrong with me? Count me in on it."

A says, "Okay. I don't know but what it is best to do it in the evening; I don't know what hours, but let's do it, okay."

So there you have, so far, a combination of two persons, at least, planning to do an unlawful act, that is, rob a bank, which is prohibited by federal law. Further, you have both of them members of that conspiracy. They don't write a letter to each other, go before a Notary Public. All it takes is to have a meeting of the minds. There is no contract with 500 provisions between a gigantic corporation, A, and an international empire, B. You go into a grocery store: "Give me a bottle

of milk." That is all you say. He hands you a bottle of milk and he gives you some money; he gives you change. There is a complete transaction, a complete contract. You hardly said anything. You might even say "Milk," and that is all. There is a complete contract, a complete meeting of the minds. You want to buy milk; he wants to sell it to you. There it is. That is all it takes. It is the same in a civil transaction as it is in a criminal, and vice versa. But there must be proof, of course, beyond a reasonable doubt that there was such a transaction. I am just giving you this rough example and I am saying that if the proof satisfies the jury beyond a reasonable doubt, that would be a conspiracy, provided there was proof on one other point.

Let me go back to that crude example of mine. B on his own, without telling A about it -- remember, A is the one who made the proposition in the first place -- B gets on the telephone with the bank, a perfectly innocent call, apparently, but with the intent of furthering the objective of the conspiracy, and he says, "What time do you close on Thursday evening?" That is a step that was taken by a member of the conspiracy which constitutes the overt act which the law makes imperative, a step taken to further the object of the conspiracy. It is as simple as

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that.

Suppose two or more persons agree amongst themselves to counterfeit money or to illegally transport alcohol or, as in the case before you, to distribute narcotics, and a single step is taken to further or advance the objective of the conspiracy, the crime of conspiracy has been committed. This is so even though the conspirators actually did not go so far as to actually counterfeit the money, or transport the alcohol, or distribute the narcotics.

If in addition to the conspiracy itself, the conspirators proceed to execute the conspiratorial plan by actually robbing a bank, or counterfeiting the money, or transporting alcohol, and so forth, a separate crime is thereby committed, and that separate crime is what we call the substantive crime.

I don't care what you call it. The point is, that is a crime over and above the conspiratorial crime. So, one is the planning, which is a crime in and of itself, and two is another crime distinct and apart, and that is the carrying out of that plan.

The law is not the ass that people ascribe to it. It is full of human understanding. What is all this thundering about conspiracy? Why is it made a pro-

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hibitive act? Because Congress knows that when people get together to plan to commit or to violate a federal law, there is no end to it. Its ramifications, its tentacles are embedded deep in the very maw of the earth. And to those who do not know what "maw" is, it is a nice English word and that means the very bowels of the earth. And so the law says, "Look out. When you get together and start to plan anything which will be the beginning step of a series of other crimes, you are committing a crime by getting together."

You with the pleasant face, madam, am I getting to you?

And you, are you getting it, sir?

How about you, sir? Do I need press any further?

How about you, sir, are you getting it?

How about you, ma'am?

J.D.?

THE JUROR: Yes.

THE COURT: And you and you? How about you? are you getting it?

Thank you.

We will take a short recess.

(Recess.)

THE COURT: A conspiracy cannot exist without at

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least two persons, whereas the separate crime to carry out the object of the conspiracy can be violated, of course, by one person. Puttingit more simply, it is a crime to conspire or plan to commit a crime, and it is another crime if the plan is carried out. I am going to repeat it backwards and forwards, because my concern that you should get it exceeds my own personal comfort. That is the way it should be. I have no use for those who do not throw themselves heart and soul into their mission, whether it be an advocate or a judge or anyone connected with the judicial system.

Because of its importance to the maintenance of law and order, an explanation of an unlawful conspiracy requires a word or two of background. Collective criminal agreement, that is, partnership in crime, creates a greater potential threat to the public than the lone wrongdoer.

Remember the example I gave you of the ugly creature with his tentacles. Once those tentacles begin to spread, it takes time to lop off every one of those tentacles. Those tentacles represent the substantive acts that follow upon the completion of the conspiracy or the carrying out of the conspiracy's objectives. So the law says that is harder to detect, that combination,

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than the wrongdoing of the lone wrongdoer.

Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish. Group association increases the likelihood and that the criminal objective will be successfully realized and renders detection more difficult than the instance of a sole aggressor.

It was because of these and other reasons that Congress made a conspiracy or concerted action to violate a federal law a crime entirely separate, distinct and different from the substantive law which may be the object of the conspiracy.

These defendants, therefore, are charged with conspiracy, together and with others. What then, is the legal language? I will give you simple examples, and then I am going to give you the legal language.

In essence, it is a crime to conspire to plan to violate a federal law. I repeat, there is no need here to prove an actual violation of another federal law. In other words, it is not necessary to show that the conspiracy succeeded. Two or more persons may agree to violate a federal law. That alone constitutes, in essence, the crime of conspiracy. If they actually violate the law

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they conspired to do, that constitutes another and separate and distinct crime. In order to find the defendants guilty on the conspiracy count, the government has the burden of proving beyond a reasonable doubt the three elements that I have already mentioned, and it must prove every one of these three elements beyond a reasonable doubt. Let me give them to you again:

The first element, that the conspiracy alleged in the indictment existed, second, that the defendant, and this applies to each one of them -- and you put the test to each one -- that the defendant was a willing and knowing member of that conspiracy. That, too, must be proved beyond a reasonable doubt; and, thirdly, that a step was taken to further or carry out the objective of the conspiracy.

A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose.

Now, there may be one of you who has not quite got this, and that is enough to cause me to expend myself gladly. It is my duty.

The gist of the crime is that unlawful agreement or combination to violate the law. A conspiracy is sometimes called a partnership in crime in which each member becomes

the agent of every other member.

The law goes on to say, to establish a conspiracy the government is not required to show that two or more persons sat around a table and then entered into a solemn pact orally or in writing stating that they had formed a conspiracy to violate the law and setting forth the details of the plan, the means by which the unlawful project was to be carried out, or the part to be played by this one or that one who are the conspirators. That is silly. Your common sense will tell you that when men, in fact, undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. Conspirators do not actually reduce their agreements to writing or acknowledge them before a Notary Public, nor do they broadcast their plans. From its very nature a conspiracy is almost invariably secret in its origin and its execution.

It is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law.

Sometimes, as I gave you in the example of robbing a bank, that requires only a few words. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful

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agreement, you may judge the acts or the conduct of the conspirators which are done in an apparent attempt to carry out a criminal purpose. The old adage, "Actions speak louder than words," is certainly applicable here. Thus, dealing with the first element which must be proven beyond a reasonable doubt, that is, the existence of the alleged conspiracy, you are not to dismember it and view its separate parts, but you are to look at it as a whole, consider all the evidence, from start to finish, all the evidence which has been admitted with respect to the conduct, the acts, the declarations of each of the alleged parties, and such inferences as may reasonably be drawn from those circumstances.

If on the basis of the sum total of such evidence and the reasonable inferences to be drawn from it, you are convinced that the minds of at least two alleged conspirators met in an understanding way, in an agreement to seek to achieve the unlawful purpose I have already pointed out to you, then this element of the offense is established.

In this connection it is not necessary for the government to prove the success of the conspiracy in order to establish a violation of the conspiracy statute. I repeat: Persons may be guilty as parties to a conspiracy

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even though the objectives they undertook to achieve were never accomplished.

Usually the only evidence available is that of disconnected acts on the part of the alleged conspirator, which acts, however, when taken together in connection with each other show a conspiracy or agreement to secure a particular result as satisfactorily and as conclusively as more direct proof.

If you find that the parties got together, then, to accomplish something unlawful, then a conspiracy is shown, even though you may find the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others, so long as those acts were done to carry out the same objective of the conspiracy. Not everyone does the same job. The man on top does one kind of job, the fellow next to him has a different kind of function to perform, and the fellow way down at the bottom runs the errands, but each one of them, if each one of them knows what the objective of the conspiracy is and is a willing and knowing member thereof, he is bound by the acts of everybody done in or outside of his presence, if done in connection with the furtherance of the objectives of the conspiracy.

As I told you during the course of the trial,

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and as I told you in that rough example where they were talking about robbing a bank, with B getting on the telephone unknown to A, A not knowing B made a telephone call, to find out about the hours of the bank, the evening hours, that is binding on A as though A made the call himself. Not everyone does the same job. The man on the top does one kind of job, the fellow next to him has a different kind of function to perform, and the fellow way down at the bottom in the example I gave you during the course of the trial, runs the errands. But if each one of them knows what the objective of the conspiracy is and is a willing and knowing member thereof, he is bound by the acts of everybody done in or outside of his presence, if done in connection with the furtherance of the objectives of the conspiracy. That is another way the law says, "If you do it, mister, don't come in here crying you didn't know that the other fellow went that far, or went in that direction, or did this or that; you are bound by it whether you knew it or not, as long as it was done in furtherance of the very objective of the conspiracy that you, mister, knew about and participated in, were a willing member of."

Then, finally, I tried to put it another way. Each conspirator need not know of every act done in furtherance of the conspiracy by the other co-conspirators in order to

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have a conspiracy exist. Under the law, a conspiracy once formed is assumed to have continued until its object has been accomplished or it hasbeen abandoned by all its members, or it has been frustrated, as by arrest, or unless there is affirmative proof offered of withdrawal or disassociation.

In determining whether the charge of conspiracy has been made out in this case, it is your task, and your task alone,on this first element of the conspiracy to judge the total picture of the asserted acts and conduct of the alleged conspirators which are claimed to have occurred for the purpose of forming and promoting the criminal agreement and seeking the alleged criminal objective.

Like many or most of the things in the law, a conspiracy is not required to be established by so-called direct evidence. The unlawful agreement or understanding which, as I have said, is the heart of the matter, may be found, if it is found at all, as a matter of inference from the conduct of the people alleged to have comprised or participated in the conspiracy.

And so, ladies and gentlemen of the jury, if you conclude that the conspiracy as charged existed, you must next decide whether the defendant -- and this applies to

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 791-1020

mmbr 15

each defendant, remember -- was a member of that conspiracy. That element, too, as I have pointed out already many times, must be established beyond a reasonable doubt, as I have defined reasonable doubt for you.

In short, whether or not a defendant was a member of a conspiracy may be determined upon the reasonable inferences to be drawn from all the evidence in the case, including the evidence that you heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirators. Putting it more succinctly, the government must prove that the defendant knowingly and wilfully joined the conspiracy during the period of its operation with the intent and purpose of furthering its objectives.

I want to caution you that mere association with one or more conspirators does not make one a member of a conspiracy. Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient without more to establish that a defendant was a participant in the conspiracy or aided and abetted the crime. Likewise, mere presence at conspiratorial discussions and knowledge of the existence of the conspiracy are not sufficient by themselves and without more to establish that a defendant was a member of the conspiracy.

mmbr 16

In other words, in order to convict, you must find from the total trial record that he was a participant in the conspiracy, and not merely a knowing spectator. You must focus upon the defendant's relationship to the crime, and not solely upon his relationship with others accused of committing the crime. His relationship to the crime must be sufficiently substantial to satisfy the concept of personal guilt.

What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends. Now, that does not necessarily mean that he has to do what we call spade work. He can get on the telephone, make a couple of calls, and he is as much a member of the conspiracy as the fellow who is doing something every other minute in connection with the furtherance of the conspiracy, so long as the defendant in making that telephone call, or whatever other simple thing he may have done, was a member, a knowing member, a willing and knowing member of the conspiracy.

A defendant may not know all of the conspirators, yet if he knows there is a conspiracy and if he has knowledge of its basic common objectives and aims and joins it, then he adopts as his own the past and future words and

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. -- 791-1020

mmbr 17

acts of all the other conspirators in furtherance of the conspiracy, as he understands it, even though he may not have been present when the words were said or the acts were done.

A person becomes a member of a conspiracy by associating himself, however informally, with the common plan or scheme, knowing the central aim or principal purpose of the overall plan or scheme and intending to aid in some way, even a minor way, to bring out the success of the plan or scheme, and hence it comes about that you have the captains and the lieutenants and the fellow on the lowest rung of the ladder. I don't think I need to expand upon it every time there is a conspiracy involving such personages, the captain does not call in the little fellow and tell him all the details of each step that is going to be taken. The test is whether each one of them knows the aims of the conspiracy and participates therein to some extent.

And so, the basic question is, what was the scope of and nature of the agreement as the defendants saw it? What persons and what kinds of activities did he have a good reason to believe were involved in furtherance of the aim of the conspiracy? Knowledge is a matter of inference from the facts proved. It is not necessary that

mmbr 18

a defendant be fully informed as to the details of the scope of the conspiracy in order to justify an inference of knowledge on his part. To have guilty knowledge, a defendant need not know the full extent of the conspiracy and all of its activities and actors. However, there is need to find, and find beyond a reasonable doubt, that a defendant charged with a conspiracy had knowledge of the general illicit purpose of violating federal law.

Accordingly, to find a defendant before you guilty under the conspiracy count, you must find that he entered into the conspiracy with specific criminal intent and knowledge. The only way you have of answering or arriving at the state of mind of a defendant in the case before you is to take into consideration all the facts and circumstances shown by the total evidence.

I repeat, direct proof here with regard to wilful or wrongful intent or knowledge is not necessary. They may be inferred from acts or a combination of acts. These are questions of fact to be determined from all the circumstances by you, and you alone.

I repeat, a conspirator need not know all the members of the conspiracy. A conspiracy and a defendant's participation therein may be inferred from such facts and circumstances in evidence as logically tend to sustain that

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. 10007 791-1020

mmbr 19

inference. The independent evidence of illicit association in a conspiracy may be totally circumstantial. To find any defendant guilty of conspiracy, you must find that he knowingly and intentionally participated therein. This means that a party acted deliberately and with knowledge and purposely participated therein, intending to violate the law, rather than through inadvertence, mistake or negligence.

In determining whether or not a defendant, or any other person was a party to or member of such a common plan, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in such a common plan must be established by evidence as to his own conduct -- that is, what he himself knowingly said or did.

If and when it appears from the evidence, direct or circumstantial, in the case that such a common plan did exist, and that the defendant was one of the members of the plan, then the acts and statements by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the common plan or conspiracy, and in furtherance of some intended object or purpose of the plan.

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mdbr 1

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Otherwise, any statement or admission made or act done by one person, outside of court, may not be considered as evidence against any person who was not present and did not see the act done, or hear the statement made.

To sum it up, the government must establish beyond a reasonable doubt that a defendant, aware of its purposes and objects, entered into the conspiracy with a specific criminal intent, that is, that a defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Should you find that a conspiracy existed and that based on proof of its actual participation therein a defendant was a member, and that is established beyond a reasonable doubt then the acts and declarations -- and I know this sounds repetitious -- then the acts and declarations of any other person you may find was also a member of the conspiracy made during its pendency and in furtherance of its objectives are considered to be acts of all the current members, even though they were not present.

This is so because when persons enter into a conspiracy to accomplish an unlawful end they become responsible for one another in carrying out the conspir-

mdbr 2

acy and thereafter the acts and declarations of others whom you find to be members of that same conspiracy may be considered against the defendant if you find the defendant to be a member of the conspiracy when those acts or declarations occurred, and if those acts are done and declarations made in furtherance of that very same conspiracy.

We come now to the law on overt acts.

I gave you the simple example, that rough example, of a telephone call made, what hour does the bank close in the evening? That is an overt act made in order to carry out or further the objective of that conspiracy between A and B to rob the bank.

And so we come to a more detailed enlargement. Of what the law means by overt acts. That is the third element of the conspiracy count that you must consider, and that must be established beyond a reasonable doubt, as I defined reasonable doubt for you, like each element, and that is whether an overt act took place.

The offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the conspirators.

What is the overt act? I have already indicated to you it is anystep or any action or conduct, even innocent

on its face, like a telephone call, which is taken to achieve, accomplish or further the objective of the conspiracy.

The purpose of requiring proof of one overt act is another example of the understanding of the legislators of human behavor. Why do they insist that there should be an overt act in order to complete the crime, and without the overt act proven beyond a reasonable doubt a defendant must be acquitted?

For the simple reason that the overt act shows the intent to go forward with the plan, that they didn't abandon it, that A and B didn't talk about robbing the bank and then said "Oh, let it go."

But when one takes a step that shows that they were determined to go forward, that the plan was not abandoned, that it was being translated into tangible overt action.

Thepurpose of requiring proof of one overt act is that while parties might conspire and agree to violate the law they may change their mainds and do nothing to carry it into effect, in which event it will not constitue an offense.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not be committed by the particular defendant

mdbr 4

under consideration.

Let me read you an example of an overt act. They are all in the indictment and you are going to get them. They are on three legal sheets among 24 in number, and I don't propose to read them except to give you an example here and there.

"One: In or about February 1973 defendant Ernest Malizia met co-conspirator Mario Perna at the Evergreen Bar at 490 Fifth Avenue, Brooklyn, New York, and had a conversation.

"Two: In or about February 1973 defendants Ernest Malizia and Frank Pallatta, also known as 'Bolot', also known as 'Nose', met in the Bronx, New York, and rode in an automobile.

"3. In or about March 1973 Defendant Frank Pallatta, also kown as 'Bolot', also known as 'Nose', met defendant Ernest Malizia and co-conspirator Mario Perna at the Raceway Diner in Yonkers, New York, and discussed narcotics."

Those are the alleged overt acts. I repeat: Some of them are perfectly innocent on their face, but the government must under the law allege some, but not all, of what it contends are the overt acts.

You see, I repeat again, that parties may conspire

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

mdbr 5

and agree to do an unlawful thing, and they may change their minds and not go through with it and drop it and pull out of it right away, and so the law says when you do an overt act, however, in furtherance of it, that shows you were in it, to use the vernacular, you had not abandoned it, you undertook to fulfil its object.

The prosecution under our law, is not required to set forth in the indictment each and every act on which it relies to establish the conspiracy or the defendants' participation therein, nor is it required to prove each overt act which may have occurred during the furtherance of the conspiracy. It is required to prove at least one such act did take place. The overt act or step essential to sustain a conspiracy need not implicate all the conspirators nor is it required that each of the conspirators participate in or commit that particular overt act. It is sufficient that such overt act was performed by any one or some of the conspirators. This is so since the act of one conspirator, as I have already pointed out, done in furtherance of the conspiracy, becomes the act of all the conspirators.

The guilt of a conspirator is not measured by the extent or the duration of the participation in the conspiracy, nor is it necessary that he received a

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. 791-1020

mdbr 6

pecuniary benefit for his participation. That is the law. If a defendant participated in the conspiracy to a more limited degree than others, or if he received less benefit than others, he is equally culpable so long as he was in fact a conspirator.

As alleged in the indictment, the conspiracy commenced on or about January 1, 1973, and continued until on or about July 10, 1975. It is the law that the government need not prove that the conspiracy existed over the whole course of time which is alleged in the indictment; the duration of a conspiracy may be very short, it may be very long, it may last even for many years, or during parts of each year.

You must bear in mind that once formed a particular conspiracy must retain throughout its existence the same basic agreement and the same objective present when the conspiracy started. It must be the same conspiracy, not some other conspiracy.

If you don't find such a single overall conspiracy, the government will have failed to establish the single overall conspiracy as charged in Count 1.

If you find that within that period all the elements of this crime have been demonstrated to your satisfaction beyond a reasonable doubt, as I have defined

mdbr 7

reasonable doubt for you, then that crime becomes complete.

Having endeavored to drive home the significance of these propositions of law which you must -- not may -- must follow and apply, let me read you -- because now you have the meaning now these words will mean something to you, I hope, I feel confident -- the exact language of Count 1 in the indictment.

The grand jury charges from on or about the 1st day of January 1973 and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York Joseph Magnano, also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Firhard Bolella, Louis Macchiarola, also known as Red Hot, Michael Carbone, Dominic Tufaro, also known as Donnie Boy, Frank Ferraro, also known as Skooch, Carmine Margiasso, also known as Charlie, Anthony DeLutro, also known as Tony West, Anthony Soldano, also known as Tony, Joseph Malizia, also known as Patsy Pontiac, Ernest Malizia, John Gwynn, William Chapman, also known as Chappy, St. Julian Harrison, Frank Lucas, Gerard Cachoian, also known as Coco, Roberto Rivera, and Gabriel Rodriguez, also known as Cass, also known as Cassanova, the defendants, and Frank Caravella, Alex Pulphus, Joseph Condella, Jose Ramos, Mario Perna and Anthony Verzino, named herein as

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mdbr 8

co-conspirators, but not as defendants, and others to the grand jury unknown, unlawfully, wilfully, and knowingly combined, conspired, confederated, and agreed together and with each other to violate Sections so and so and so and so -- and those are the sections dealing with the illegal possession of prohibited narcotic substances.

The conspiracy goes on.

Two: It was part of said conspiracy that the said defendants unlawfully, wilfully, and knowingly, would distribute and possess with intent to distribute Schedule 1 and 2 narcotic drug controlled substances, the exact amount thereof being to the grand jury unknown, in violation of Congressional Act No. such and such and such and such.

I have a feeling of contentment that this reading falls upon understanding ears.

And then is set forth the overt acts in three full pages.

Let me take up the subject of multiple conspiracy. Someof the defendants have contended that the government's proof fails to show the existence of the one overall conspiracy which this indictment charges. They argue that no conspiracy existed, or if in fact one did exist then at best the evidence shows several separate and independent

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. - 791-1020

mdbr 9

conspiracies involving various groups of the defendants.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single conspiracy which the indictment charges.

So what you must first do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find no such conspiracy existed then you acquit. However, if you are satisfied that such a conspiracy existed you must determine who the members were of that conspiracy. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, you must acquit that defendant.

In other words, to find a defendant guilty you must find that he was a member of the very conspiracy charged in the indictment and not in some other conspiracy.

In determining whether a given conspiracy exists you may consider what the evidence shows as to the changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel or activities, provided you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy contin-

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

ued to be those charged in the indictment.

The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme while others were not active or had terminated their relationship.

If you decide that the conspiracy charged in the indictment existed between any of the defendants you must then decide as to each defendant individually whether he joined the conspiracy with knowledge of any of its purposes.

In determining whether any defendant was a party each is entitled to individual consideration of the proof respecting him, including any evidence of his knowledge or lack of knowledge, his status as a partner, or supervisor, his participation in key conversations, his participation in the plan, scheme, or agreements alleged.

Does that come through?

The law on conspiracy is clear, but a conspiracy

mdbr 11

itself is an unusual, unique and characteristically exceptional type of offense. In spreading a net to catch the participants the main operatives as well as the so-called little guy may be scooped up. The evidence as to some, including the big and little, may meet the test warranting conviction, while the test as to others may be insufficient. The big as well as the little may escape altogether from the net. The net may hold the small but not the big, or the big and not the small, or some of both.

As the United States Court of Appeals observed "When the government throws out its big conspiracy net to catch the big fish in the criminal sea it has to be aware that an occasional minnow may wriggle free."

We now come to consideration of the law respecting the substantive counts. My burden to convince you with regard to each proposition of law remains the same until the last word, but I think I can say that the heaviest part of the total charge is behind us.

Let me read you the indictment as it relates to the substantive counts -- that means the counts other than the conspiracy count.

The second count -- and I will read you the pertinent language -- the grand jury further charges in or about March 1973 in the Southern District of New York

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mdbr 12

Joseph Maganano, also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Richard Bolella, Louis Macchiarola also known as Red Hot, Michael Carbone, Dominic Tufaro also known as Donnie Boy, Frank Ferraro also known as Skooch and Carmine Margiasso also known as Charlie, the defendants, unlawfully -- here it is -- this is the language, repeated over and over again, in the substantive counts -- unlawfully, wilfully, and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substnace, to wit, approximately 2 kilograms of heroin.

The third count: The grand jury further charges: In or about March 1973 in the Southern District of New York, Joseph Maganano, also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Richard Bollela, Louis Macchiarola also known as Red Hot, Michael Carbone, Dominic Tufaro, also known as Donnie Boy, Frank Ferraro also known as Skooch and Carmine Margiasso also known as Charlie, the defendants -- here again -- unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 4 kilograms of heroin.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mdbr 13

The fourth count.

The grand jury further charges:

In or about November 1973 in the Southern District of New York, Joseph Magnano also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Richard Bolella, Louis Macchiarola also known as Red Hot, Michael Carbone, Dominic Tufaro also known as Donnie Boy, Frank Ferrar also known as Skooch and Carmine Margiasso also known as Charlie, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug.

What is it this time? How much? The charge is 12 kilograms of heroin.

The fifth Count:

The grand jury further charges:

In or about March 1973 in the Southern District of New York, St. Julian Harrison and Frank Lucas the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

The sixth Count:

The grand jury further charges:

In or about October 1973 in the Southern District

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 10007

of New York, Frank Lucas the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute Schedule 1 and 2 narcotic drug controlled substnaces, to wit, approximately 4 kilograms of heroin and 2 kilograms of cocaine.

The seventh Count:

The grand jury further charges:

On or about the 1st day of December 1973 in the Southern District of New York, Frank Lucas the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 10 kilograms of heroin.

The eighth Count:

The grand jury further charges:

In or about November 1973 in the Southern District of New York, Anthony DeLutro also known as Tony West, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 5 kilograms of heroin.

The ninth Count:

The grand jury further charges:

In or about January, 1974 in the Southern

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK NY 791-1020

mdbr 15

District of New York, defendants Anthony Soldano also known as Tony, and Joseph Malizia also known as Patsy Pontiac, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

The tenth Count:

The grand jury further charges:

In or about March, 1973 in the Southern District of New York, Johnny Gwynn the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately one-quarter kilogram of heroin.

Now we go to 14, the fourteenth count.

The grand jury further charges:

On or about October 30, 1973, in the Southern District of New York, the defendant, John Gwynn, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, 159.5 grams of cocaine.

The fifteenth Count:

The grand jury further charges:

On or about the 20th day of December 1973 in the Southern District of New York, John Gwynn, the defendant,

mdbr 16

unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, 151.5 grams of cocaine.

The sixteenth Count:

The grand jury further charges:

On or about the 15th day of January, 1974, in the Southern District of New York, John Gwynn, the defnedant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, 148.5 grams of heroin.

Why don't I say to you, here it is, here is the indictment, take it, take it into the jury room. You can have it any way, whether I say it or not you go and read it for yourself. Because that would be a way of shoving on to you the burden that is unwarranted. You have enough of a burden.

What is the statute with regard to substantive acts? Having read you the language of the indictment repeated over and over and over again you have have seen how the indictment follows the statute, the Congressional Act. The statute which the defendants are alleged to have violated in addition to the conspiracy statute, here it is, in pertinent part:

"It shall be unlawful for any person knowingly

or intentionally to distribute or ... to ... possess with intent to distribute a controlled substance..."

Simple, right to the point. There it is.

Mr. Man, woman, you do that, you violate that law. It says that it shall be unlawful for any person knowingly or intentionally to distribute or to possess with intent to distribute a controlled substance.

Now, what must the government prove beyond a reasonable doubt in order to sustain a charge such as I have read you in each one of those counts?

I told you what the government had to prove beyond a reasonable doubt in order to establish a conspiracy. Now let me tell you what the government must establish beyond a reasonable doubt in order to establish the crime of the substantive count. Of course what I say as to one applies to each one of the counts.

What must the government prove?

Before you can find the named defendants guilty of the crimes charged in these counts of the indictment you mst be convinced beyond a reasonable doubt that the government has proved the following elements:

One: That on or about the dates set forth in each count the defendant or defendants named in that count distributed or possessed with intent to distribute

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mdbr 18

a narcotic controlled substance.

The second element that must be proved beyond a reasonable doubt: That they do so unlawfully,wilfully and knowingly.

The third element that must be established beyond a reasonable doubt is that the substance which the defendant or defendants named in the count possessed was in fact a narcotic drug controlled substance.

I will say a few further words on these elements in just a moment. I don't think you are going to have much trouble, of course, with the third element. There were stipulations with regard to that, but nevertheless yours is the obligation to resolve that third element as well as the first and second.

Let us take up the first element. You will note that the first element of the offense is "Distribution of the drug or possession with intent to distribute the drug. "

What does that phrase mean? The word "distribute" means the actual constructive or attempt to transfer of the drug. The word possess has its common every day meaning, that is to have something within your control. It does not necessarily mean to have it in your hand or pocket. Control may be demonstrated

mdbr 19

by the existence of a working relationship between the person having such control and the person with actual physical custody.

15 people rob a house and take a diamond and one of them holds the diamond. Does that mean that the other 14 haven't actually possession of it, that they don't also hold it in their hand? See how stupid that would

And that word "intent" refers to a person's state of mind, and so the term "possess with intent to distribute" can be fairly stated to mean to control an item with the state of mind or purpose to transfer that item.

On this element the government contends that it has proved beyond a reasonable doubt that the defendants knowingly transferred the drug and possessed the drug and that at the time they possessed it their mental state was such that they would transfer it to someone else.

If you find beyond a reasonable doubt that such transfers were made I charge you that each such transfer satisfies this requirement of the statute.

Now, let us go to the second element that must be established beyond a reasonable doubt. The terms "unlawfully, wilfully and knowingly" mean that you must be

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mdbr 20

satisfied beyond a reasonable doubt that the defendants knew what they were doing and they did it deliberately and voluntarily as opposed to mistakenly or accidentally or as a result of some coercion.

Of course, it is not necessary that the defendants knew they were violating any particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that they were aware of the general, unlawful nature of their acts.

Now, let us go to the third element which must be proved beyond a reasonable doubt, that the narcotic drug controlled substance is either heroin or cocaine. I instruct you as a matter of law that heroin and cocaine are narcotic drug controlled substances mentioned in the prohibited act enacted by Congress and made a law.

You, however, must still find beyond a reasonable doubt that the substance is heroin, or cocaine as charged in the specific count.

As I have previously instructed you it is not necessary in order for the government to prove its case of conspiracy to violate the narcotic laws that there be proof of actual dealings in narcotics. All that need be proved is that unlawful agreement and an overt act committed in pursuance of the agreement. The conspiracy

A I don't recall it.

Q Would you say the bill was about $40,000?

A I don't know; I have no idea.

Q Because you don't recall?

A I don't know.

Q Well, do you know who manages Leonard's?

A No.

Q Do you know who owns Leonard's?

A No.

Q Have you ever been in your life to Leonard's prior to the time your daughter had her reception there?

A Yes, sir.

Q How many times had you been there?

A Maybe once or twice.

Q Whom did you go there with, sir?

A I don't recall.

Q How many times did you go to Las Vegas in 1973?

A I don't think I went at all in 1974.

Q But you may have gone once or twice?

A When? In '73?

Q Yes.

A I don't think I went at all. I'm not sure.

Q How many times did you go to Las Vegas in 1974?

A I think I went twice.

Q You went once in January of 1974?

A Right.

Q Whom did you go there with, sir?

A My wife.

Q Did you go with anyone else?

A Yes, sir.

Q Whom did you go there with?

A Michael Rosalie and his wife, Andy Rosalie and his wif , and there were quite a few more people there. I don't recall their names.

Q You don't know any of the last names of any of the other people you went with?

A No, sir.

Q Is that the same Andy Rosalie who testified here for you?

AYes.

Q Was he the attorney?

A Yes, sir.

Q Who paid, sir, for you and your wife to go to Las Vegas?

A I did.

Q In January of 1974?

A Right.

Q Under what name did you fly to Las Vegas in January

of 1974?

A I think it was my own name, Anthony DeLutro.

Q But it may have been a different name? Is that correct?

A That is correct.

Q It could have been anyone of several names?

A No, just one other name.

Q What is the other name?

A Anthony Rossi.

Q You would have travelled to Las Vegas under the name of Anthony Rossi?

A Yes, sir.

Q And you would have travelled to Las Vegas under the name of Anthony De Lutro?

A Yes, sir.

Q But you can't recall which you usedin January of 1974?

A I am pretty sure it was Anthony DeLutro.

Q You are pretty sure, but you are not certain?

A Almost certain.

Q How about the other time you went to Las Vegas in 1974?

A In March?

Q What name did you use?

A I think I went under the name Anthony Rossi.

Q Was there a reason for that? There is a reason why you use the name Anthony Rossi when you went to Las Vegas the other time, 1974, wasn't there?

A Yes, sir.

Q And those are the two you recall going to Las Vegas in 1974?

A My best recollection, yes.

Q There may have been other times, though? Right?

A I doubt it.

Q How much did it cost you to go to Las Vegas in January of 1974?

A I think $500.

Q For you and your wife?

A Yes, sir.

Q That is the total expenditures that you put out in January of 1974?

A Yes, sir.

Q Including the airplane trip?

A Yes, sir.

Q And including your stay at the Riviera?

A Yes, sir.

Q You didn't gamble while you were there?

A Yes,sir.

Q You gambled a little bit?

A Yes, sir.

Q You made some money?

A Yes, sir.

Q How much money did you make?

A I don't recall.

Q Would you say it was over $10,000?

A Very possible.

Q Over $20,000?

A Maybe just about.

Q It could have been as much as $20,000 that you made?

A Yes, sir.

Q And that was in January of 1974?

A Well, no, that is between the both trips; I could not say which one in January, or the next trip. It was one of the trips.

Q Was it while you were in Las Vegas that you won the money?

A Yes, sir.

Q So it was either the January trip or the other trip?

A It could have been a little in both trips.

Q Why don't you tell us when the other trip was made to Vegas?

A When the other trip was made?

Q The one other than January, if I may, of 1974.

A I think it was March of 1974.

It's when Sinatra came back again.

Q Do you go often to see Sinatra in Vegas, Mr. DeLutro?

A I saw him twice there.

Q It was the first two times in your life you saw Sinatra in Vegas?

A Yes, sir.

Q How much did it cost you to go to Vegas in March?

A Nothing.

Q It didn't cost you any money to go at all there?

A That's right.

Q Did you pay?

A No, sir.

Q You didn't pay at all?

A I bought the tickets, and they -- they return the money back when you get there, MGM.

Q You didn't pay the airplane tickets?

A That's the tickets, that's the money they give you back.

Q You didn't pay the hotel people?

A It's completely.

Q You have friends in Vegas?

A No. They know you're coming out to gamble.

Q What's the name of that flight to Vegas? Do you know the name of that flight where MGM picks up everything as long as you gamble? Is it called a luxury --

A Not really, because they are not all going to MGM. The whole plane is not filled up with MGM people.

Q You can't recall?

A No.

Q It's an exclusive affair, isn't it?

A No, sir.

Q How much money did you take when you went to Vegas in January of 1974 with which to gamble?

A I don't quite remember.

Q Hardly any?

A Right.

Q Did you gamble at that time?

A Yes.

Q How much money did you make?

A I don't recall. I know I left a marker there for 10,000.

Q How much money did you borrow while you were there?

A In January? I think it was 10,500.

Q This was in January -- this was in 1974?

A Right.

Q You testified you made $30,000 in 1974, didn't you?

A Yes, sir.

Q What about the other time you borrowed?

A I borrowed another 10,000.

Q So you borrowed 10,000 on two occasions?

A Right.

Q Did you borrow the $10,000 on two occasions during the same trip?

A No, sir.

Q It was two different trips?

A Yes, sir.

Q Did you make any other trips by plane in 1973 to any other places?

A I think twice to Florida, and -- I don't know if it's '73 or '74. Twice to Florida, and once to L.A.

Q Did you go to Europe in 1973?

A I've never been to Europe .

Q Did you go to Atlanta in 1973?

A Yes, sir.

Q Did you fly to Atlanta?

A Yes, sir.

Q Did you pay the bills?

A Yes, sir.

Q Did you go down there in 1974, also?

A Yes, sir.

Q Would it be fair to say -- when you say "quite often," you go once a month to Atlanta?

A Correct. But not every month.

Q Would it be fair to say in 1973 you went to Atlanta ten times?

A I'd say maybe six to eight times.

Q To visit your brother?

A Yes, sir.

Q Who was incarcerated?

A At that time he was incarcerated. Right.

Q You went there, you had to sign, is that correct?

A Yes, sir.

Q And you went there in 1974, also?

A That's right.

Q Your brother was released from custody when, in the middle of 1974?

A No, in the middle of 1975.

Q And you paid for these flights down there in 1975, didn't you?

A Yes, sir.

Q Did you go to Atlanta under your own name?

A Yes, sir.

Q And you made $10,000 in --

MR. J. PANZER: Just a minute.

Q Did you go to Atlanta under your own name?

A Yes, sir.

Q Anthony DeLutro?

A Yes, sir.

Q And you made $10,000 in 1973, is that correct?

A What do you mean I made $10,000?

Q And you made $10,000 in 1973 is that correct?

A I don't follow you, I made it. I don't understand. You mean my income tax?

Q Yes.

A Approximately, yes.

Q Do you recall your testimony on Friday?

A Yes.

Q You're sure that whatever amount was on your income tax return that was the amount that you made?

A Yes.

Q That was the amount that you earned in 1973?

A Yes.

Q You testified on direct examination that you were convicted for a liquor violation, you were sentenced to two years in prison, correct?

A Yes, sir.

Q You were also convicted at the same time for a conspiracy to commit that same offense, were you not?

A Yes, sir.

Q Where else in 1973 or in 1974 did you fly, except Atlanta and Las Vegas?

A L.A. and Florida.

Q Is it possible that you flew to other cities also in 1974?

A No.

Q With respect to L.A., was that 1974?

A Yes.

MR. AMORCSA: Line 8 on page 61, just altering ~~that with a word or two~~ so that it is understandable.

Q With respect to L.A., was that in 1974?

A I'm pretty sure it was, yes.

Q When in 1974?

A I don't remember exactly.

Q It was in the summer?

A Yeah. It wasn't -- no, not in the summer, no. I don't think -- no, I don't think it was too warm, but it wasn't cold, either.

Q Are you sure it was 1974?

A Almost.

Q It could have been 1973?

A No. I'm almost positive it was '74.

Q Was that the only -- strike that.

Is that the only one, the only other plane trip that you recall occurring in 1974 besides the ones you have already testified about?

A Yes. Unless I might have went to Florida too then. I'm not sure about Florida that year.

Q How many times did you go to Florida in 1974?

A I don't know about '74. I know between 73 and '74 I think it was twice.

Q Is it possible you went in '73 and '74?

A It's possible.

Q When did you go to Florida?

A I don't remember exactly, no.

Q Was it in a winter month?

A I think it was -- if I am not mistaken, I think it was the Easter holidays of '73.

Q Did you go for a vacation?

A Yeah. I took a week off.

Q Maybe you went to Florida in '73 and '74 for a week's vacation?

A No. Only once I went for a week's vacation. Another time I stood there three days.

Q You paid for that, of course, yourself?

A No, I didn't.

Q You didn't pay anything on one occasion?

A On the one occasion, no.

Q Who was the person who picked up the bill?

A Michael Risoli.

Q Is he the brother of Andy Risoli?

A Yes, sir.

Q Who was the person who testified here on your direct case?

A Yes, sir.

Q Where did you stay in Florida at that time?

A At the Doral.

Q The Doral Country Club?

A No.

Q The hotel?

A Yes.

Q Was Sinatra there at that time?

A No, sir.

Q Did you stay in a room?

a Yes, sir.

Q What interest does Michael Risoli have in the Doral Hotel?

A The people that own the Doral Hotel own the Belmont Plaza Hotel where he has his flower shop, and he got a good deal by going down there, he saved a lot of money. Being that he's a tenant of their's you know.

Q Who else did you go to Florida with at that time when this fellow Michael Risoli picked up the tab for you?

A My wife and I think my daughter and a coupleof his children.

Q Was the tab picked up for all three of you?

A Yes, sir.

Q Do you know what it came to?

A No, sir.

Q [redacted]

A Possibly.

Q It could have been?

A It could have been a thousand.

You mean just for the three of us?

Q It could have been as much as $10,000, isn't that correct?

A No. No, sir.

Q You doubt it, but it may be so, isn't that correct?

A I doubt it very much.

Q No way?

A Right.

Q While you were down at Florida, did you go to Puerto Rico?

A No, sir.

Q You didn't fly to the Bahamas?

A No, sir.

Q To do a little gambling?

A No, sir.

Q Would you tell us when it was as best as you can recall that the tab was picked up for you on this Florida trip?

A I don't quite remember when.

Q You would say in 1973?

A Very possible.

Q Did you go to Florida again in '74?

A Yes. That's possible, too.

Q And you were certain of this, that you went to Florida two times within the last two years or three years?

A Correct.

Q You're certain of that?

A Correct.

Q With respect to the second time did you pick up the tab yourself?

A Yes.

Q Who went with you the second time?

A Some fellow I know.

Q Who was that friend?

A Some fellow Joe Bis.

Q What's Joes's last name?

A I don't know his last name.

Q DiPalerma?

A No.

Q You can't recall Joe's last name?

A Well, I know it's not DiPalermo

Q Does he have a nickname?

A That's his nickname, Joe Bis.

mdlt 12 DeLutro-cross

A Not that I know of.

Q Where did you stay when you went to Las Vegas?

A I don't remember exactly.

Q Who did you go with?

A Some girl.

Q Did you pick up the tab?

A Yes.

Q How much did it come to?

A I don't quite remember.

Q For the hotel it didn't come to -- strike that.

How much did it cost you to fly there and fly back?

A I don't remember exactly.

Q Could it have been $1,000?

A I doubt it.

Q Is it possible that you took three additional plane trips?

A No, it is not possible.

Q When did you go to Los Angeles?

A Some time last year, I think.

Q Was it in 1974?

A I believe so.

Q You can't recall when in '74, is that correct?

A Right.

Q How long have you been associated with that person?

A Which person?

Q Joe Bis.

A A couple of years.

Q Did you pick up the tab for him and yourself?

A I believe so, but I'm not sure.

Q You went down there on a vacation?

A For a couple of days.

Q A few days?

A Yes.

Q This was in 1974?

A I think so.

Q Did you go and take any other plane trips in 1973 or 1974 other than the ones you have already testified to?

A No, sir.

Q Is it possible that you did take additional plane trips?

A I doubt it very much.

Q Is it possible that you took five additional plane trips?

A No.

Q Could it have been $500?

Wait 14 Deutro-cross

MR. AMOROSA: The transcript does not read correctly at this stage, your Honor. I will move on several questions. Do you agree?

MR. J. PANZER: Yes, surely.

Q Do you know Murry Simpson?

A Yes.

Q He was a witness here, also, right?

A That's right.

Q He also saw this alleged incident which occurred in Raymond's, is that correct?

A That's right.

Q You recall he was there at the time, don't you?

A Well, he reminded me of it.

Q He refreshed your memory as to what happened?

A Right.

Q He approached you on it?

A Not refresh my memory. He refreshed my memory that he was there.

Q He approached you on it?

A He had heard about the incident that happened, and he knew -- knew of it, and I didn't know he knew it, but he come and told me about it. When I heard that, I called him as a witness.

Q Did he tell you from whom he heard it, about it?

A In the place.

Q Is he your friend?

A He is a customer.

Q Is he a customer of Raymond's?

A Yes.

Q Would you characterize him as your friend?

A I believe so.

Q Have you talked to him on the phone?

A Yes.

Q Have you talked to any one of Merrill Lynch, Pierce, Fenner & Smith?

A No, sir.

Q The stockbrokerage firm of Merrill Lynch, Pierce, Fenner & Smith?

A No,sir.

Q Do you own any stocks?

A No, sir.

Q Have you called anyone in a stock brokerage firm in the last year?

A No, sir.

Q You don't recall?

A I said "No, sir."

Q Didn't you have this phone number in your possession at the time of your arrest in this case?

A It's possible.

Q You don't recall having that phone number?

MR. J. PANZER: Wait a minute, there's another question. The fourth question, the stock brokerage frim.

Q The stock brokerage firm, Merrill Lynch, you don't recall having that phone number?

A I said, "It's possible."

Q The customers in Raymond's?

A What was that?

Q Are they customers of Raymond's?

A They are customers of the restaurant's.

Q Is that correct?

A Yes, they must be, if I had the number in my pocket.

Q Have you done any business with the security, Pacific International Bank located at 319 West 48th Street in New York?

A Not that I recall.

Q You may have, though, is that correct?

A I doubt it.

Q So your answer is no, you did not have any business dealings with them?

A I would have to say that, yes.

Q You didn't buy any stocks in your name or Iris deJesus' name in ~~the~~ last two years?

A That's correct.

Q Do you still have the '73 Cadillac?

A Yes, sir.

Q What kind of car did you have prior to that time?

A How far back do you want to go?

Q Immediately prior to that time.

A I didn't have any.

Q You didn't have an automobile?

A No,sir.

Q You couldn't afford one?

A That's right.

Q Where does Iris deJesus work?

A She don't.

Q But she lives with you, is that correct?

A She's my wife.

Q She is now Mrs. DeLutro?

A That's right.

Q When were you married?

A September 14, 1975.

Q Did you have a reception?

A No, just a small party, around six or eight

people.

Q At Raymond's?

A Yes, sir.

Q Your son was also recently married?

A Yes, sir.

Q Where was he married?

A At the Cotillion Terrace, in Brooklyn.

Q Is that a restaurant?

A A catering hall.

Q Did you pay the expenses?

A No, sir,

Q You testified when Verzino came into the bar early in November he went over and started talking to some man, do you recall that?

A No. I walked into the restaurant and I saw him talking to some man.

Q Do you recall testifying, sir, that Verzino came in Raymond's some night early in November 1973? Do you recall testifying to that on direct examination? Yes or no?

A I couldn't hear that.

Q Do you recall testifying that Verzino came into Raymond's some night early in November, 1973? Do you recall testifying to that on direct examination?

A I remember testifying to the first one that you said, that when I walked in he was there talking to some fellow, November '73.

Q Where did he go after he came in?

A He stood at the bar, he saw me, offered me a drink. I was in the middle of the bar talking to this girl Trixie, or Tricia. He sent us a drink. I acknowledged the drink. I don't know if I finished it. When he bought me the drink, then he was alone at that point because the man had already left.

Q He came in, he met with you, and you went over to 30th Street?

A Do you want me to tell you the whole story again or piece by piece?

Q Just answer. Is that correct?

THE WITNESS: He is mixing me up, your Honor.

THE COURT: Let's have the question. What is the pending question, Mr. Amorosa? What did you ask?

MR. AMOROSA: The question is where did he go after he came in.

THE COURT: Yes. Where did he go after he came in? What's your answer?

THE WITNESS: Where did who go?

THE COURT: Verzino.

THE WITNESS: He took me to the bar on 30th Street. He asked me if I wanted to go over there and meet some friends of his.

THE COURT: And you went?

THE WITNESS: I went with him, right.

THE COURT: All right.

Q Did you know the person Verzino was with at the bar?

A No.

Q You never saw him before in your life?

A Never.

Q You knew Verzino was a junk dealer?

A I didn't know it, no.

Q You never asked him?

A No, sir.

Q You knew Verzino was in Atlanta for selling heroin?

A I didn't know that, no.

Q You knew he was in Atlanta?

A Yes,sir.

Q But you didn't know for a certainty that he was there because he was selling heroin?

A That's right.

Q So when he walked into your bar or into Raymond's

that night early in November and went over to speak to that guy, you didn't have any suspicions at all that something might be going on in your presence, is that correct?

A He was talking to the guy before I came in, and after I was there he must have been with the guy maybe three minutes more, or maybe five minutes. I don't think it was five minutes. And the man was gone.

Q Did you have any suspicions about that conversation?

A Well, no, not exactly, but I just don't go in and interfere with people's conversations when they're talking. I don't put myself inbetween there.

Q You couldn't care if they were talking about heroin?

A I wouldn't care the least, as long as I don't know about it.

Q It has nothing to do with you, right?

A So long as it's got nothing to do with me and I don't know about it.

Q Do you recall testifying on direct examination that when you saw this person with Verzino you made it a point not to walk over to him? Do you recall that?

A I make it a point with anybody that's talking to anybody.

Q You made it a point to walk over, to not walk over and listen to what they were saying?

A Correct.

Q You had no suspicions what they were doing?

A Correct.

Q You saw that person again that night too?

A Correct.

Q You saw him although he was in a car?

A Correct.

Q And then Verzino told you after you both saw this man "You don't me, Tony, to walk back to Raymond's," is that what Verzino said?

A No, I don't think he used the words, "You don't need me."

He says, "You can go back, I'll see you" or "Go back and I'll see you."

Q You said, "I'll see you?"

A He said, "I'll see you."

Q And you said --

A No, he said it, or I said it. It could have been I said it.

Q And you walked on?

A Right.

Q And you didn't turn back?

A Correct.

Q Do you recall testifying to that?

A Correct.

Q Did you know at this time Verzino was in a narcotics transaction that night?

A No, sir.

Q Do you know why Mario Perna was in Atlanta?

A No, sir.

Q You had heard that Mario Perna was in Atlanta?

A Yes, sir.

Q Where did you hear it at?

A I don't know exactly where, but I know I heard it. Or was it I think -- if I am not mistaken, I think it was the same night he introduced me to him.

Q Where did you see it?

A I think I heard it off Tony Verzino.

Q Who told you?

A I'm pretty sure it was Tony Verzino.

Q When did he tell you that?

A When he took me to the bar and introduced me to him.

Q How long have you known Anthony Verzino?

A About fifteen years.

Q You met him in various bars?

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A Yes, sir.

Q In the Bronx and New York?

A Never in the Bronx.

Q Only in New York?

A In mid-Manhattan.

Q Are you still getting $50 a week commission from the flower shop?

A Yes, sir.

Q You have been getting that since 1973?

A No. I think it was '74.

Q In 1973, though, you made $10,000.

A I believe so. Around that figure. I don't know exactly how much.

MR. AMOROSA: Your Honor, that concludes the cross examination. There are several other questions, but they are not on cross examination.

THE COURT: All right.

Is there anything from you, Mr. Panzer?

MR. J. PANZER: No, your Honor.

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REGINALD LEE, a witness called on behalf of the government in rebuttal, being first duly sworn, testified as follows:

THE COURT: Mr. Lee, I have done this with every witness, and I understand you may be the last witness in this case. I don't see why I should not say the same thing that I said to everyone up to now: Please keep your voice up so the jury can hear every word that comes from you,

and, secondly, will you just answer the question that is put to you. Don't volunteer anything.

Will you remember that?

THE WITNESS: Yes.

THE COURT: Sit back in your seat and relax and speak loudly.

DIRECT EXAMINATION

BY MR. AMOROSA:

Q By whom are you employed?

A New York City Department of Correction.

Q In what capacity?

A I am in the Legal Division of the department.

Q How long have you been so employed with the Department of Correction?

A 14 years.

Q Sir, did you bring with you today documents reflecting where Anthony Verzino was incarcerated from the time of his arrest on February 25, 1974, until March 5, 1974?

A Yes, sir.

Q Will you take those documents out, please --

THE COURT: May I interrupt? I don't want this to be unnecessarily prolonged. Is Mr. Lee an attorney?

THE WITNESS: No, sir.

THE COURT: But you have been in the offices of the lawyers in the department for these years?

THE WITNESS: No, sir, I have been in the capacity I am presently in for only three weeks.

THE COURT: And before that?

THE WITNESS: I was the chief clerk at the Manhattan House of Detention.

THE COURT: Can't he tell us the essence of those records, rather than going into them?

MR. AMOROSA: We intend to offer the records, your Honor.

THE COURT: Do you need to offer the records in light of what you told us inside? I wonder whether you need them?

MR. AMOROSA: Perhaps I don't.

Q Mr. Lee, did you have occasion in the last day or so to look at records which were kept in the ordinary and regular course of business by the Department of Correction?

A Yes, sir.

Q Was it in the regular and ordinary course of business again that those records were kept?

A Yes, sir.

Q Were the entries made in the ordinary and regular course of business?

A Yes, sir.

Q Now, tell us from those, sir, where Anthony Verzino was incarcerated from February 25, 1974, until March 5, 1974?

A He was received at the Manhattan House of Detention on February 26, 1974; he was transferred to the New York City House of Detention for Men at Riker's Island on March 4, 1974.

Q Now, the first institution, is that the Tombs?

A Yes, sir.

Q Where did he go after he went to Riker's Island on March 4, 1974?

A On March 5th, the following day, he was transferred to Ossining Correctional Facility as an overloaded case.

Q You say, sir, that was March 5, 1974?

A Yes, sir.

Q And the entries in the case March 5,1974, he was transferred there?

A Yes, he was inthe Tombs from February 26, 1974 until March 4, 1974.

Q And on March 4th he was transferred to Riker's Island? Is that correct?

A Yes, sir.

Q And the next day, March 5, he was transferred to Sing Sing?

A Yes, sir.

MR. AMOROSA: No further questions.

CROSS EXAMINATION

BY MR. J. PANZER:

Q He would be in Sing Sing from March 5th on?

A He was in Sing Sing from March 5th until his return to the Manhattan House of Detention on March 14th.

THE COURT: Any other questions of the witness? Thank you, sir.

Step down.

MR. AMOROSA: Thank you.

(Witness excused.)

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MD 2-1

CHARGE OF THE COURT

THE COURT: Madam Forelady, Ladies and Gentlemen of the Jury: I would be sadly remiss if I failed at the very outset of this, the Court's charge to the jury, to express to each one of you a keen satisfaction that comes to the Court and to counsel for the undivided attention that you have constantly demonstrated throughout the course of this trial.

It is evident that you have discharged your duty with fidelity. You have followed the testimony with intelligent understanding and absorbing interest. I am quite satisfied that no single matter relating to the factual issues has escaped your attention.

You have been silent throughout and when your turn comes to speak I have every confidence, and I am sure counsel on both sides join me in this, that in accordance with the solemnity of your oath and the high order of your conscience, you will pronounce the justice due in this case.

Your selection was the result of great care exercised by the Court and counsel. Your mission is not easy, and we are sure you did not expect it to be.

A distinguished philosopher, Albert Camus, a Nobel prize winner, summed it up for all of us -- for you,

MD T2-2

for the Judge, for counsel -- when he wrote that justice dies from the moment it becomes a comfort, when it ceases to be a burning reality, a demand upon one's self.

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Just imagine where in the whole civilized world will you find what I am about to recite? Only true in America that when the government comes in, the United States Government, with all its power, coming in on behalf of the people of the United States, when it comes into a courtroom our law is that it has no advantage whatever, it is just another litigant, and it is actually called the plaintiff in the law.

The powerful United States of America comes into

MD 2-9

court and starts the contest right at the same mark with the defendant. How do you like that?

In every country of the world almost as soon as a case is started the government is already on second base before a word has been uttered. Those who tear at the vitals of America, do they know that proposition of law, do they know the bloody pages of history that it took to bring this into being? We point with pride to it.

And so the fact that the United States Government comes into this courtroom and levels a charge on behalf of the people against each one of these eight defendants now before us, the government starts just where each one of the defendants starts. It has no advantage whatever, but it is entitled to no less consideration than each of the defendants.

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MD2-13

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It is for you, the jury, yes, the jury only, to make an independent, objective, detached assessment of the total evidence. I venture the suggestion that with all the sincerity in the world even the advocates on either side of the table cannot do that completely, for the interests of their respective clients are bound to rub off onto them, even subconsciously.

So you see why the law names you, the jury, and you alone, to pronounce the last word, so to speak, on what the total trial record points to as the guilt or innocence of each defendant on trial before you.

See how imperative it is that you take the law exclusively from the Judge presiding. Without meaning to mislead you many of counsel for the defense during summation emphasized the point that the case presents no corroboration of the testimony of Perna and Verzino. Some of the attorneys actually used the words "no corroboration."

Well, under the law no corroboration is necessary. To argue that the testimony of Perna and

MD 2-14

Verzino is unworthy of belief, and that there is no credible or believable evidence supportive of their testimony, is one thing, but to insist that there must be or should be supportive or corroborative testimony is to add a requirement not countenanced by law.

Or take this example. Counsel have emphasized the corruptability of Perna and Verzino, and well they might. However, you do not consider the testimony of Perna and Verzino in isolation or in vacuum, as it were. It is to be estimated, assessed, and evaluated in conjunction with all the other evidence in the case, including the testimony of the two defendants who took the stand.

The testimony of Perna and Verzino then is to be considered in conjunction with the entire trial record, all the evidence, all the other witnesses, all the stipulations -- and they are important, those stipulations, because they embody proof, evidence -- and all the exhibits, and each of the concessions made throughout the entire trial.

Here's another example. One or two attorneys during summation advanced the thought that the $585,000, approximately, in cash found, along with drugs and other materials, in the presence of defendant Lucas, and received and marked in evidence, is not binding on any other

MD 2-15

defendant. It is not as easy as that. I shall develop that later. But for the present let me comment if there actually was a conspiracy, and you so find, and a defendant before you other than Lucas was a willing and knowing member of that particular conspiracy, and further you are convinced that all the cash, or a part of it, and the other materials, were under all the facts and circumstances related to the objective of the conspiracy, that cash and the other materials are as binding on that other defendant as though they were actually found on him or in the premises occupied by him.

After all, there is nothing unusual about t[illegible] end product of any illegal enterprise. The financial return is the be all and end all of the undertaking. Even when playing a game there comes a time when someone picks up the marbles.

So that's the reason why you pay attention to the law given to you by the Judge, not to well-meaning remarks that might lead you astray. And I rush in to say there was no such intent on the part of any counsel.

This may surprise you, but as a trial judge in the United States District Court I have a perfect right to comment on the evidence. That is unlike what you have heard in the state court. I have the power, if I wish to

use it, in any case, civil or criminal, to say to a jury, after telling them what their powers are, that in my opinion Witness X, who took the stand, was nothing but a corrupt liar, and I wouldn't believe him on a stack of bibles from the floor to the ceiling. All I need to do is add "But you are not bound by my estimate; you are the judges of the facts."

Or I can say of another witness: "In my opinion that witness spoke the gospel truth. But you, the jury, are not bound by my estimate."

I can tell you how I feel about the facts. I can comment on them openly, distinctly pointing out, however, that you and you alone are the judges of the facts.

I shall do no such thing, and I never have. I don't believe that I should praise you, do you honor, rise when you come in -- and why do I do that? As a sign of respect for the enormity of the burden that you carry -- I don't believe that I should praise you, do you honor, speak of you as the ministers of justice, and then invade the orbit of your function. To me, that is talking out of both sides of one's mouth. That is your responsibility and you are going to have to meet it, and I have no doubt that you will.

MD 2-17

What more can a judge say than what I told you when you were being selected, that the fact-finding function often proves more burdensome than laying down the law. I know, for the greater part of my own life has been spent as a fact finder.

Since I have the power to talk about the evidence and even give you my evaluation of it, I distinctly forbid you from reading into the tone of my voice or the emphasis that I may apply here or there to a proposition of law how the Judge feels about the facts. If I wanted to tell you, I would tell you outright, since I have a perfect right to do it.

I have long fought for the proposition that if you've got something you believe in you go up the front way, don't go sneaking around the back. So that if I wanted to tell you my impression of some of the evidence, I'd come right up the front way, because I've got the power to do it. I don't have to resort to innuendo.

I want to rush in and say don't you dare try to spell out how the Judge feels about any fact by the tone of my voice or the way I move about. My function is to instruct you as to the law, and it is your sworn duty -- you will remember I emphasized it while you were being selected -- to apply the law as I state it to you in these

MD 2-18

instructions and apply it to the facts as you, the jury, find them to be.

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MD 2=27

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Now, what are all these charges? Reduced to its simplest term, here's what it amounts to. I told you the first count charges a conspiracy. It charges that all of the defendants together and with others known and unknown to the grand jury conspired to violate the narcotics law. This is called a conspiracy count.

I'll tell you in a bit what we mean by a conspiracy, what the law means. A word just now will help you. It is a plan of two or more people to violate a federal law. That is, in brief, what it amounts to. "Let's get together and agree and become willing and knowing members of an agreement between us to violate the narcotics law." That's it. To do that alone is a conspiracy, as I shall define conspiracy, and that's a separate crime from going out and possessing the drugs.

"Let's get together and take stolen property across state lines. What do you say?

"Okay."

There is a plan to commit a federal crime, which is the illegal transportation of certain properties across

MD 2-28

state lines.

"Let's get together and avoid the payment of a tax on beer.

"Okay, count me in."

If all the elements that I will define shortly are present, if they are brought to the attention of the jury by proof beyond a reasonable doubt, that alone is a conspiracy. And if they go and transport that liquor or that beer without tax, that's a separate crime.

Am I getting through a bit? Stay with me, and I'll drive it home.

Now, the remaining counts are what we call substantive counts.

So these remaining counts are the substantive counts. The conspiracy count here charges that they got together to violate the federal law with regard to the possession of drugs, and the substantive counts charge that they did exactly that, that they did carry out the objectives of the conspiracy, and that is, actually possess with intent to distribute narcotic drugs.

So 1 charges the conspiracy, even though they did not have a bit of drugs, and possession the forbidden drug with intent, knowing, et cetera, et cetera, that is a separate charge.

Do you get it, madam?

And so these substantive counts charge violations of the federal narcotics law in that the defendants named in each count are accused of distributing and possessing with intent to distribute various amounts of heroin and cocaine. I shall go into each count separately.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which is the objective of the conspiracy. Theessence of the crime of conspiracy is an agreement or undertaking to violate other laws. So if a conspiracy exists, even if it should fail of its purpose, it is still punishable as a crime. Consequently, in a conspiracy charge there

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is no need to prove an actual violation of the narcotics laws. Just getting together and planning it, that is a crime.

Now, let's go right to it -- and bear with me and see if I can't make this clear. A lot of people have difficulty with conspiracy. And I think if you stay with me we will bring it home to you. I have already told you that the conspiracy count is distinct from the charges made in the remaining counts. This fact, however, does not preclude you from considering proof of an actual violation as evidence that a conspiracy existed. Before you may convict any of the defendants under this count, the following essential elements must be established beyond a reasonable doubt:

First: You must find the existence of the conspiracy charged;

Second: You must find that the particular defendant whose guilt or innocence you are considering knowingly and wilfully associated himself with the conspiracy; and, finally,

Third: You must find that one of the conspirators committed at least one of the overt acts set forth in the indictment at or about the time and place alleged. I shall presently refer to the overt acts.

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If the government fails to establish each essential element beyond a reasonable doubt, you must acquit the defendant on this count; if it succeeds, your duty is to convict him on this count.

Let me give you a crude example of an overt act: A says to B, "I have decided I am going to rob that bank down the street," and B says, "When are you going to do it?"

And A said, "I don't know, but I am figuring on doing it soon."

And B says, "What's wrong with me? Count me in on it."

A says, "Okay. I don't know but what it is best to do it in the evening; I don't know what hours, but let's do it, okay."

So there you have, so far, a combination of two persons, at least,planning to do an unlawful act, that is, rob a bank, which is prohibited by federal law. Further, you have both of them members of that conspiracy. They don't write a letter to each other, go before a Notary Public. All it takes is to have a meeting of the minds. There is no contract with 500 provisions between a gigantic corporation, A, and an international empire, B. You go into a grocery store: "Give me a bottle

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of milk." That is all you say. He hands you a bottle of milk and he gives you some money; he gives you change. There is a complete transaction, a complete contract. You hardly said anything. You might even say "Milk," and that is all. There is a complete contract, a complete meeting of the minds. You want to buy milk; he wants to sell it to you. There it is. That is all it takes. It is the same in a civil transaction as it is in a criminal, and vice versa. But there must be proof, of course, beyond a reasonable doubt that there was such a transaction. I am just giving you this rough example and I am saying that if the proof satisfies the jury beyond a reasonable doubt, that would be a conspiracy, provided there was proof on one other point.

Let me go back to that crude example of mine. B on his own, without telling A about it -- remember, A is the one who made the proposition in the first place -- B gets on the telephone with the bank, a perfectly innocent call, apparently, but with the intent of furthering the objective of the conspiracy, and he says, "What time do you close on Thursday evening?" That is a step that was taken by a member of the conspiracy which constitutes the overt act which the law makes imperative, a step taken to further the object of the conspiracy. It is as simple as

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that.

Suppose two or more persons agree amongst themselves to counterfeit money or to illegally transport alcohol or, as in the case before you, to distribute narcotics, and a single step is taken to further or advance the objective of the conspiracy, the crime of conspiracy has been committed. This is so even though the conspirators actually did not go so far as to actually counterfeit the money, or transport the alcohol, or distribute the narcotics.

If in addition to the conspiracy itself, the conspirators proceed to execute the conspiratorial plan by actually robbing a bank, or counterfeiting the money, or transporting alcohol, and so forth, a separate crime is thereby committed, and that separate crime is what we call the substantive crime.

I don't care what you call it. The point is, that is a crime over and above the conspiratorial crime. So, one is the planning, which is a crime in and of itself, and two is another crime distinct and apart, and that is the carrying out of that plan.

The law is not the ass that people ascribe to it. It is full of human understanding. What is all this thundering about conspiracy? Why is it made a pro-

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hibitive act? Because Congress knows that when people get together to plan to commit or to violate a federal law, there is no end to it. Its ramifications, its tentacles are embedded deep in the very maw of the earth. And to those who do not know what "maw" is, it is a nice English word and that means the very bowels of the earth. And so the law says, "Look out. When you get together and start to plan anything which will be the beginning step of a series of other crimes, you are committing a crime by getting together."

You with the pleasant face, madam, am I getting to you?

And you, are you getting it, sir?

How about you, sir? Do I need press any further?

How about you, sir, are you getting it?

How about you, ma'am?

J.D.?

THE JUROR: Yes.

THE COURT: And you and you? How about you? are you getting it?

Thank you.

We will take a short recess.

(Recess.)

THE COURT: A conspiracy cannot exist without at

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least two persons, whereas the separate crime to carry out the object of the conspiracy can be violated, of course, by one person. Puttingit more simply, it is a crime to conspire or plan to commit a crime, and it is another crime if the plan is carried out. I am going to repeat it backwards and forwards, because my concern that you should get it exceeds my own personal comfort. That is the way it should be. I have no use for those who do not throw themselves heart and soul into their mission, whether it be an advocate or a judge or anyone connected with the judicial system.

Because of its importance to the maintenance of law and order, an explanation of an unlawful conspiracy requires a word or two of background. Collective criminal agreement, that is, partnership in crime, creates a greater potential threat to the public than the lone wrongdoer.

Remember the example I gave you of the ugly creature with his tentacles. Once those tentacles begin to spread, it takes time to lop off every one of those tentacles. Those tentacles represent the substantive acts that follow upon the completion of the conspiracy or the carrying out of the conspiracy's objectives. So the law says that is harder to detect, that combination,

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than the wrongdoing of the lone wrongdoer.

Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish. Group association increases the likelihood and that the criminal objective will be successfully realized and renders detection more difficult than the instance of a sole aggressor.

It was because of these and other reasons that Congress made a conspiracy or concerted action to violate a federal law a crime entirely separate, distinct and different from the substantive law which may be the object of the conspiracy.

These defendants, therefore, are charged with conspiracy, together and with others. What then, is the legal language? I will give you simple examples, and then I am going to give you the legal language.

In essence, it is a crime to conspire to plan to violate a federal law. I repeat, there is no need here to prove an actual violation of another federal law. In other words, it is not necessary to show that the conspiracy succeeded. Two or more persons may agree to violate a federal law. That alone constitutes, in essence, the crime of conspiracy. If they actually violate the law

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they conspired to do, that constitutes another and separate and distinct crime. In order to find the defendants guilty on the conspiracy count, the government has the burden of proving beyond a reasonable doubt the three elements that I have already mentioned, and it must prove every one of these three elements beyond a reasonable doubt. Let me give them to you again:

The first element, that the conspiracy alleged in the indictment existed, second, that the defendant, and this applies to each one of them -- and you put the test to each one -- that the defendant was a willing and knowing member of that conspiracy. That, too, must be proved beyond a reasonable doubt; and, thirdly, that a step was taken to further or carry out the objective of the conspiracy.

A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose.

Now, there may be one of you who has not quite got this, and that is enough to cause me to expend myself gladly. It is my duty.

The gist of the crime is that unlawful agreement or combination to violate the law. A conspiracy is sometimes called a partnership in crime in which each member becomes

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the agent of every other member.

The law goes on to say, to establish a conspiracy the government is not required to show that two or more persons sat around a table and then entered into a solemn pact orally or in writing stating that they had formed a conspiracy to violate the law and setting forth the details of the plan, the means by which the unlawful project was to be carried out, or the part to be played by this one or that one who are the conspirators. That is silly. Your common sense will tell you that when men, in fact, undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. Conspirators do not actually reduce their agreements to writing or acknowledge them before a Notary Public, nor do they broadcast their plans. From its very nature a conspiracy is almost invariably secret in its origin and its execution.

It is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law.

Sometimes, as I gave you in the example of robbing a bank, that requires only a few words. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful

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agreement, you may judge the acts or the conduct of the conspirators which are done in an apparent attempt to carry out a criminal purpose. The old adage, "Actions speak louder than words," is certainly applicable here. Thus, dealing with the first element which must be proven beyond a reasonable doubt, that is, the existence of the alleged conspiracy, you are not to dismember it and view its separate parts, but you are to look at it as a whole, consider all the evidence, from start to finish, all the evidence which has been admitted with respect to the conduct, the acts, the declarations of each of the alleged parties, and such inferences as may reasonably be drawn from those circumstances.

If on the basis of the sum total of such evidence and the reasonable inferences to be drawn from it, you are convinced that the minds of at least two alleged conspirators met in an understanding way, in an agreement to seek to achieve the unlawful purpose I have already pointed out to you, then this element of the offense is established.

In this connection it is not necessary for the government to prove the success of the conspiracy in order to establish a violation of the conspiracy statute. I repeat: Persons may be guilty as parties to a conspiracy

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even though the objectives they undertook to achieve were never accomplished.

Usually the only evidence available is that of disconnected acts on the part of the alleged conspirator, which acts, however, when taken together in connection with each other show a conspiracy or agreement to secure a particular result as satisfactorily and as conclusively as more direct proof.

If you find that the parties got together, then, to accomplish something unlawful, then a conspiracy is shown, even though you may find the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others, so long as those acts were done to carry out the same objective of the conspiracy. Not everyone does the same job. The man on top does one kind of job, the fellow next to him has a different kind of function to perform, and the fellow way down at the bottom runs the errands, but each one of them, if each one of them knows what the objective of the conspiracy is and is a willing and knowing member thereof, he is bound by the acts of everybody done in or outside of his presence, if done in connection with the furtherance of the objectives of the conspiracy.

As I told you during the course of the trial,

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and as I told you in that rough example where they were talking about robbing a bank, with B getting on the telephone unknown to A, A not knowing B made a telephone call, to find out about the hours of the bank, the evening hours, that is binding on A as though A made the call himself. Not everyone does the same job. The man on the top does one kind of job, the fellow next to him has a different kind of function to perform, and the fellow way down at the bottom in the example I gave you during the course of the trial, runs the errands. But if each one of them knows what the objective of the conspiracy is and is a willing and knowing member thereof, he is bound by the acts of everybody done in or outside of his presence, if done in connection with the furtherance of the objectives of the conspiracy. That is another way the law says, "If you do it, mister, don't come in here crying you didn't know that the other fellow went that far, or went in that direction, or did this or that; you are bound by it whether you knew it or not, as long as it was done in furtherance of the very objective of the conspiracy that you, mister, knew about and participated in, were a willing member of."

Then, finally, I tried to put it another way. Each conspirator need not know of every act done in furtherance of the conspiracy by the other co-conspirators in order to

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have a conspiracy exist. Under the law, a conspiracy once formed is assumed to have continued until its object has been accomplished or it hasbeen abandoned by all its members, or it has been frustrated, as by arrest, or unless there is affirmative proof offered of withdrawal or disassociation.

In determining whether the charge of conspiracy has been made out in this case, it is your task, and your task alone,on this first element of the conspiracy to judge the total picture of the asserted acts and conduct of the alleged conspirators which are claimed to have occurred for the purpose of forming and promoting the criminal agreement and seeking the alleged criminal objective.

Like many or most of the things in the law, a conspiracy is not required to be established by so-called direct evidence. The unlawful agreement or understanding which, as I have said, is the heart of the matter, may be found, if it is found at all, as a matter of inference from the conduct of the people alleged to have comprised or participated in the conspiracy.

And so, ladies and gentlemen of the jury, if you conclude that the conspiracy as charged existed, you must next decide whether the defendant -- and this applies to

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each defendant, remember -- was a member of that conspiracy. That element, too, as I have pointed out already many times, must be established beyond a reasonable doubt, as I have defined reasonable doubt for you.

In short, whether or not a defendant was a member of a conspiracy may be determined upon the reasonable inferences to be drawn from all the evidence in the case, including the evidence that you heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirators. Putting it more succinctly, the government must prove that the defendant knowingly and wilfully joined the conspiracy during the period of its operation with the intent and purpose of furthering its objectives.

I want to caution you that mere association with one or more conspirators does not make one a member of a conspiracy. Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient without more to establish that a defendant was a participant in the conspiracy or aided and abetted the crime. Likewise, mere presence at conspiratorial discussions and knowledge of the existence of the conspiracy are not sufficient by themselves and without more to establish that a defendant was a member of the conspiracy.

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In other words, in order to convict, you must find from the total trial record that he was a participant in the conspiracy, and not merely a knowing spectator. You must focus upon the defendant's relationship to the crime, and not solely upon his relationship with others accused of committing the crime. His relationship to the crime must be sufficiently substantial to satisfy the concept of personal guilt.

What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends. Now, that does not necessarily mean that he has to do what we call spade work. He can get on the telephone, make a couple of calls, and he is as much a member of the conspiracy as the fellow who is doing something every other minute in connection with the furtherance of the conspiracy, so long as the defendant in making that telephone call, or whatever other simple thing he may have done, was a member, a knowing member, a willing and knowing member of the conspiracy.

A defendant may not know all of the conspirators, yet if he knows there is a conspiracy and if he has knowledge of its basic common objectives and aims and joins it, then he adopts as his own the past and future words and

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acts of all the other conspirators in furtherance of the conspiracy, as he understands it, even though he may not have been present when the words were said or the acts were done.

A person becomes a member of a conspiracy by associating himself, however informally, with the common plan or scheme, knowing the central aim or principal purpose of the overall plan or scheme and intending to aid in some way, even a minor way, to bring out the success of the plan or scheme, and hence it comes about that you have the captains and the lieutenants and the fellow on the lowest rung of the ladder. I don't think I need to expand upon it every time there is a conspiracy involving such personages, the captain does not call in the little fellow and tell him all the details of each step that is going to be taken. The test is whether each one of them knows the aims of the conspiracy and participates therein to some extent.

And so, the basic question is, what was the scope of and nature of the agreement as the defendants saw it? What persons and what kinds of activities did he have a good reason to believe were involved in furtherance of the aim of the conspiracy? Knowledge is a matter of inference from the facts proved. It is not necessary that

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a defendant be fully informed as to the details of the scope of the conspiracy in order to justify an inference of knowledge on his part. To have guilty knowledge, a defendant need not know the full extent of the conspiracy and all of its activities and actors. However, there is need to find, and find beyond a reasonable doubt, that a defendant charged with a conspiracy had knowledge of the general illicit purpose of violating federal law.

Accordingly, to find a defendant before you guilty under the conspiracy count, you must find that he entered into the conspiracy with specific criminal intent and knowledge. The only way you have of answering or arriving at the state of mind of a defendant in the case before you is to take into consideration all the facts and circumstances shown by the total evidence.

I repeat, direct proof here with regard to wilful or wrongful intent or knowledge is not necessary. They may be inferred from acts or a combination of acts. These are questions of fact to be determined from all the circumstances by you, and you alone.

I repeat, a conspirator need not know all the members of the conspiracy. A conspiracy and a defendant's participation therein may be inferred from such facts and circumstances in evidence as logically tend to sustain that

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inference. The independent evidence of illicit association in a conspiracy may be totally circumstantial. To find any defendant guilty of conspiracy, you must find that he knowingly and intentionally participated therein. This means that a party acted deliberately and with knowledge and purposely participated therein, intending to violate the law, rather than through inadvertence, mistake or negligence.

In determining whether or not a defendant, or any other person was a party to or member of such a common plan, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in such a common plan must be established by evidence as to his own conduct -- that is, what he himself knowingly said or did.

If and when it appears from the evidence, direct or circumstantial, in the case that such a common plan did exist, and that the defendant was one of the members of the plan, then the acts and statements by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the common plan or conspiracy, and in furtherance of some intended object or purpose of the plan.

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Otherwise, any statement or admission made or act done by one person, outside of court, may not be considered as evidence against any person who was not present and did not see the act done, or hear the statement made.

To sum it up, the government must establish beyond a reasonable doubt that a defendant, aware of its purposes and objects, entered into the conspiracy with a specific criminal intent, that is, that a defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Should you find that a conspiracy existed and that based on proof of its actual participation therein a defendant was a member, and that is established beyond a reasonable doubt then the acts and declarations -- and I know this sounds repetitious -- then the acts and declarations of any other person you may find was also a member of the conspiracy made during its pendency and in furtherance of its objectives are considered to be acts of all the current members, even though they were not present.

This is so because when persons enter into a conspiracy to accomplish an unlawful end they become responsible for one another in carrying out the conspir-

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acy and thereafter the acts and declarations of others whom you find to be members of that same conspiracy may be considered against the defendant if you find the defendant to be a member of the conspiracy when those acts or declarations occurred, and if those acts are done and declarations made in furtherance of that very same conspiracy.

We come now to the law on overt acts.

I gave you the simple example, that rough example, of a telephone call made, what hour does the bank close in the evening? That is an overt act made in order to carry out or further the objective of that conspiracy between A and B to rob the bank.

And so we come to a more detailed enlargement. Of what the law means by overt acts. That is the third element of the conspiracy count that you must consider, and that must be established beyond a reasonable doubt, as I defined reasonable doubt for you, like each element, and that is whether an overt act took place.

The offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the conspirators.

What is the overt act? I have already indicated to you it is anystep or any action or conduct, even innocent

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on its face, like a telephone call, which is taken to achieve, accomplish or further the objective of the conspiracy.

The purpose of requiring proof of one overt act is another example of the understanding of the legislators of human behavor. Why do they insist that there should be an overt act in order to complete the crime, and without the overt act proven beyond a reasonable doubt a defendant must be acquitted?

For the simple reason that the overt act shows the intent to go forward with the plan, that they didn't abandon it, that A and B didn't talk about robbing the bank and then said "Oh, let it go."

But when one takes a step that shows that they were determined to go forward, that the plan was not abandoned, that it was being translated into tangible overt action.

Thepurpose of requiring proof of one overt act is that while parties might conspire amd agree to violate the law they may change their mainds and do nothing to carry it into effect, in which event it will not constitue an offense.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not be committed by the particular defendant

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under consideration.

Let me read you an example of an overt act. They are all in the indictment and you are going to get them. They are on three legal sheets among 24 in number, and I don't propose to read them except to give you an example here and there.

"One: In or about February 1973 defendant Ernest Malizia met co-conspirator Mario Perna at the Evergreen Bar at 490 Fifth Avenue, Brooklyn, New York, and had a conversation.

"Two: In or about February 1973 defendants Ernest Malizia and Frank Pallatta, also known as 'Bolot', also known as 'Nose', met in the Bronx, New York, and rode in an automobile.

"3. In or about March 1973 Defendant Frank Pallatta, also kown as 'Bolot', also known as 'Nose', met defendant Ernest Malizia and co-conspirator Mario Perna at the Raceway Diner in Yonkers, New York, and discussed narcotics."

Those are the alleged overt acts. I repeat: Some of them are perfectly innocent on their face, but the government must under the law allege some, but not all, of what it contends are the overt acts.

You see, I repeat again, that parties may conspire

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and agree to do an unlawful t ing, and they may change their minds and not go through with it and drop it and pull out of it right away, and so the law says when you do an overt act, however, in furtherance of it, that shows you were in it, to use the vernacular, you had not abandoned it, you undertook to fulfil its object.

The prosecution under our law, is not required to set forth in the indictment each and every act on which it relies to establish the conspiracy or the defendants' participation therein, nor is it required to prove each overt act which may have occurred during the furtherance of the conspiracy. It is required to prove at least one such act did take place. The overt act or step essential to sustain a conspiracy need not implicate all the conspirators nor is it required that each of the conspirators participate in or commit that particular overt act. It is sufficient that such overt act was performed by any one or some of the conspirators. This is so since the act of one conspirator, as I have already pointed out, done in furtherance of the conspiracy, becomes the act of all the conspirators.

The guilt of a conspirator is not measured by the extent or the duration of the participation in the conspiracy, nor is it necessary that he received a

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pecuniary benefit for his participation. That is the law. If a defendant participated in the conspiracy to a more limited degree than others, or if he received less benefit than others, he is equally culpable so long as he was in fact a conspirator.

As alleged in the indictment, the conspiracy commenced on or about January 1, 1973, and continued until on or about July 10, 1975. It is the law that the government need not prove that the conspiracy existed over the whole course of time which is alleged in the indictment; the duration of a conspiracy may be very short, it may be very long, it may last even for many years, or during parts of each year.

You must bear in mind that once formed a particular conspiracy must retain throughout its existence the same basic agreement and the same objective present when the conspiracy started. It must be the same conspiracy, not some other conspiracy.

If you don't find such a single overall conspiracy, the government will have failed to establish the single overall conspiracy as charged in Count 1.

If you find that within that period all the elements of this crime have been demonstrated to your satisfaction beyond a reasonable doubt, as I have defined

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reasonable doubt for you, then that crime becomes complete.

Having endeavored to drive home the significance of these propositions of law which you must -- not may -- must follow and apply, let me read you -- because now you have the meaning now these words will mean something to you, I hope, I feel confident -- the exact language of Count 1 in the indictment.

The grand jury charges from on or about the 1st day of January 1973 and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York Joseph Magnano, also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Firhard Bolella, Louis Macchiarola, also known as Red Hot, Michael Carbone, Dominic Tufaro, also known as Donnie Boy, Frank Ferraro, also known as Skooch, Carmine Margiasso, also known as Charlie, Anthony DeLutro, also known as Tony West, Anthony Soldano, also known as Tony, Joseph Malizia, also known as Patsy Pontiac, Ernest Malizia, John Gwynn, William Chapman, also known as Chappy, St. Julian Harrison, Frank Lucas, Gerard Cachoian, also known as Coco, Roberto Rivera, and Gabriel Rodriguez, also known as Cass, also known as Cassanova, the defendants, and Frank Caravella, Alex Pulphus, Joseph Condella, Jose Ramos, Mario Perna and Anthony Verzino, named herein as

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mdbr 8

co-conspirators, but not as defendants, and others to the grand jury unknown, unlawfully, wilfully, and knowingly combined, conspired, confederated, and agreed together and with each other to violate Sections so and so and so and so -- and those are the sections dealing with the illegal possession of prohibited narcotic substances.

The conspiracy goes on.

Two: It was part of said conspiracy that the said defendants unlawfully, wilfully, and knowingly, would distribute and possess with intent to distribute Schedule 1 and 2 narcotic drug controlled substances, the exact amount thereof being to the grand jury unknown, in violation of Congressional Act No. such and such and such and such.

I have a feeling of contentment that this reading falls upon understanding ears.

And then is set forth the overt acts in three full pages.

Let me take up the subject of multiple conspiracy. Someof the defendants have contended that the government's proof fails to show the existence of the one overall conspiracy which this indictment charges. They argue that no conspiracy existed, or if in fact one did exist then at best the evidence shows several separate and independent

mdbr 9

conspiracies involving various groups of the defendants.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single conspiracy which the indictment charges.

So what you must first do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find no such conspiracy existed then you acquit. However, if you are satisfied that such a conspiracy existed you must determine who the members were of that conspiracy. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, you must acquit that defendant.

In other words, to find a defendant guilty you must find that he was a member of the very conspiracy charged in the indictment and not in some other conspiracy.

In determining whether a given conspiracy exists you may consider what the evidence shows as to the changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel or activities, provided you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy contin-

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ued to be those charged in the indictment.

The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme while others were not active or had terminated their relationship.

If you decide that the conspiracy charged in the indictment existed between any of the defendants you must then decide as to each defendant individually whether he joined the conspiracy with knowledge of any of its purposes.

In determining whether any defendant was a party each is entitled to individual consideration of the proof respecting him, including any evidence of his knowledge or lack of knowledge, his status as a partner, or supervisor, his participation in key conversations, his participation in the plan, scheme, or agreements alleged.

Does that come through?

The law on conspiracy is clear, but a conspiracy

mdbr 11

itself is an unusual, unique and characteristically exceptional type of offense. In spreading a net to catch the participants the main operatives as well as the so-called little guy may be scooped up. The evidence as to some, including the big and little, may meet the test warranting conviction, while the test as to others may be insufficient. The big as well as the little may escape altogether from the net. The net may hold the small but not the big, or the big and not the small, or some of both.

As the United States Court of Appeals observed "When the government throws out its big conspiracy net to catch the big fish in the criminal sea it has to be aware that an occasional minnow may wriggle free."

We now come to consideration of the law

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Now a few words about what the law means by direct and circumstantial evidence.

I believe in giving examples. I believe in translating and making meaingful the heavy language of the law, and I will do it here again.

I am looking at you. That is direct proof. I see you with my eyes. Suppose I asked the clerk, is the jury here? And he says yes. I don't see you when he tells me that. That is circumstantial evidence that this very same jury is here.

After all, I don't call your names off every single time and look at every single one of you. That is circumstantial evidence that you are here, even though I don't look at you.

Suppose I gave you this language and didn't give you examples. Would you understand it? Generally, the proof offered is of objective facts and circumstances from which one in terms of common experience can rationally and logically include the ultimate fact. But with that

mdbr 32

example it comes home, doesn't it? I hope. Do you get it? Do you get it? Does anybody fail to get it?

Here is a common example used by judges over and over again.

You came in today. The good Lord was kind and gave us a shining sun, and youare here. And suddenly somebody comes into the room and he is dropping wet, and he sits down and a veritable puddle forms at his feet. You didn't see the rain. That is circumstantial evidence that is has been raining.

If you looked at the rain with your own eyes that would be direct evidence, and that is all thereis to it.

It is rare that there is directevidence on this. Knowledge is generally shown by circumstantial evidence. And so direct evidence is testimony as to what a witness saw, heard, or observed, what he knows of his own knowledge. Circumstantial evidence, on the other hand, rests on an inference. Proof is given of facts, like the umbrella, wet clothing, and one infers therefrom what reasonably follows in the common experience of mankind.

I point out to you that circumstantial evidence, if believed, is of no less value than direct evidence.

There is absolutely no requirement that proof of a crime and a defendant's guilt be by either or both

mdbr 33

types of evidence. The only requirement is that the proof, circumstantial or direct, or all of one or all of the other, be beyond a reasonable doubt.

Now we come to accomplice testimony. Perna, Verzino. What's an accomplice in the eyes of the law? I am sure you know it. An accomplice is any person who participates in the commission of an alleged offense.

The accomplice, an associate in performing a crime has the purpose of either promoting, facilitating, incurring or aiding another in committing a particular crime. The fact a number of government witnesses are accomplices or have criminal records is to be carefully considered by you as bearing upon their credibility.

It is to be expected that the participants in an enterprise so unholy and so illegal will not be upright gentlemen.

Nevertheless, that doesn't say that you can settle for less than what the law demands. You must realize, I am sure, that in the prosecution of a trial the government is frequently called upon to use witnesses who are accomplices. Often it has no choice. This is particularly so in case of conspiracy. Frequently it happens that only the members of the conspiracy and he or their accomplices have evidence which is relevant to

mdbr 34

and important to the case.

However, it does not follow, because a person has acknowledged participation in a crime, or is an accomplice or has a criminal record, that he is not capable of giving a truthful version of what occurred. That is for you to decide.

As with courage, so it is with truthfulness. It frequently comes from the mostly unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosure gushes forth.

The testimony of such persons, however, should be viewed with caution, must be scrutinized with the utmost circumspection.

* * * * *

* * * * *

What about a defendant who did testify? Two of them took the stand. What has the law got to say as to them? As to DeLutro and Gwynn?

The law permits, but does not require, a defendant to testify in his own behalf. The testimony of DeLutro and Gwynn is before you. You and only you can determine how much credibility or believability their testimony is entitled to or how little.

However, I instruct you that it is the law that interest creates a motive to give false testimony, that the greater the interest the stronger is the temptation, and that the interest of a defendant in the result of a trial is of a character possesed by no other witness and is, therefore, a matter which may affect the credence which shall be given to his testimony.

However, let me point out that the fact that the defendants DeLutro and Gwynn have such an interest in the case does not mean that they will testify falsely. It is for you, the jury, to decide whether they testified truthfully and how much weight to give to their testimony.

* * * * *

* * * * *

t5/3 pm
10/22

Now a few words as to the use of informants. There has been testimony with respect to the use of persons sometimes referred to as informants or informers. These services are availed of by government agents at times to obtain introductions to persons suspected of violating the law. There are certain types of crime where, without the use of informants, detection would be extremely difficult. Frequently, it is necessary to get leads for introductions to persons allegedly engaged in illegal activities or otherwise to aid enforcement officers. The law from time immemorial has permitted the use of informers, provided the rights of a defendant are not violated. Whether or not you approve the use of an informant in an effort to detect law violation is not

mmbr 11

to enter into your deliberations. I will tell you -- I don't mind including this -- that the representatives of the government to use informants sometimes take their lives into their hands. It takes courage to deal so often with these despicable characters in order to know where the fire is going on and where the rot exists and where the cash or the secret hiding places can be found. You are not going to go look for it; someone has to. The question is, what was done here in this case? Was it done with that kind of high motive or was it not? Was there pollution that runs amuck here, or is it confined? Or is there any, really, when you come to add up all the evidence?

* * * * *

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INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

#2.5

Place N.Y. N.Y.
Date Oct. 11, 1974
Time 8:05 pm

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Brana

Witness: Edward J. Holiday SA, FBI, NY NY 10/11/74

Witness: Edward J. Baker Special Agent FBI - 10/11/74

Time: 8:09 pm

the above FBI agent were properly identified to me and I agreed to talk with them on Sept. 27, 74

STATEMENT

I, Mario Anthony Brana, make the following statement freely and voluntarily. I am 45 years of age, my date of birth is May 6, 1929, and I was born in New York City. I escaped from the Federal House of Detention in New York City on Sept. 27, 1974 [illegible]

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M.P.

12:40 or 12:45 pm.

The facts surrounding the escape are as follows: About 4 1/2 months prior to Sept. 2 I removed a strip of brass about 30-36 inches long and 3 inches wide from the top step of the stairs leading from the second to the third floor, also described as the inner staircase. I cannot specifically recall if the brass strip came from that staircase step but if you check at the jail you will find a brass strip missing from the top step of one of the staircases. The reason I cannot specifically recall the staircase is due to the fact that I tried to remove more than one before being successful. It was necessary to remove more than two screws to free the brass strip.

I then obtained a file from the boiler room and also cut the brass strip into pieces about 4 1/2 inches in length by 7/8 inches and hid them in several different places. Most of the time I carried a few of the pieces on my person.

By using dampened bread dough which I pushed against the first door I was able to get an impression of the lock opening and

thus the measurements of the lock were obtained. I then began to fashion a homemade key by filing down one of the cut brass strips and cutting the channels into the brass, that is, the side channels. The only tool I used was the file mentioned above. I then found it necessary to closely observe the actual institution cell key as it hung from the key ring while on the belt of various correction officers in order to determine how I was going to duplicate or imitate the teeth of the cell key. I filed a little at a time and two to four times a day I tried the key in the lock of the sallyport door which is the first door I would have to open for the escape. Following a period of trial and error lasting 5-6 weeks I had finished the key and it opened the sallyport or first door. The color of my homemade key was close to the color of the institution key and the dimensions of the finished product were about 4 to 4½ inches long, 7/8 of an inch thick. It contained 4 teeth and the teeth were 1/16 of an inch apart. I will make a drawing or sketch of the key I made.

I attempted to repeat my effort for the second or inner sallyport door and made

M.I.P.

similar impressions of the outer portion of the lock, not the tumblers, using tongue depressors and a piece of cheese. I was successful in getting partial impressions of the tumblers and was therefore successful in creating a partial key containing the side groove and some teeth but my efforts were hampered by the fact that I was not able to get a glimpse of a close look at the the second or inner sallyport key due to the fact that those keys do not normally enter the institution. The second key and the warehouse key usually remain outside the institution in the hands of correction officers working in the trash and warehouse areas.

I was therefore unable to make the second key since I could not accurately copy the teeth but I was determined to keep trying.

About 7-8 weeks prior to Sept. 22, 1974, a Correction Officer by the name Giannino, who was working on the third floor, was approached by Nelson Garcia, one of the escapees, and while making general conversation he joked with Giannino about "how much money would it take to open the doors" and Giannino replied that it would take $200,000. Giannino had been on

friendly speaking terms with Garcia and had been bringing in cold cuts to Garcia. Garcia then approached me and stated that he had the above conversation with Giannino and was wondering whether he should approach Giannino in a serious way concerning Giannino's assistance in effecting an escape. I told him that I do not know Giannino and therefore could not trust him but I also said that if he felt confident about speaking to him to go ahead and try. At this time Garcia did not know I had made the first key. Harry Lupps, Ficconi and no other person was aware I had made the key to the first door.

I think Garcia decided not to approach Giannino because Giannino was not in the right position to help us. However, about 6 weeks prior to Sept. 22, Giannino was transfered to duty in the control room on the first floor and began working 4pm - midnight which was the same shift he was working on the third floor.

Immediately after Giannino began duty in the control room Garcia approached him and asked him "what would you want to get us the keys to the sallyport" or words to that effect and

also included the warehouse door. Giannino impression
said he wanted $5,000 for the three keys necessary
for the escape; Giannino said he wanted $5,000
for an impression of the second or inner sallyport
door key and the rest upon delivery of the other two
impressions. Giannino had previously mentioned
financial difficulty at home. Garcia came to
me and told me Giannino is willing to give us
the impressions so I cut several strips off a
styrofoam cup, white in color, and gave them
to Garcia with instructions to give them to Gi-
annino and instruct Giannino to press the key to
the second door into the styrofoam thus leaving
an impression. Giannino was given the styrofoam
by Garcia and the next day or the same night
Garcia gave me back two strips of styrofoam
bearing the impressions of both sides of the key
to the second door. The reason Giannino started
with the second door was because the first
door was to be his security, that is, he de-
cided to give Garcia the first door key impression
last because he would then be sure to get
his money. Giannino was asked to "start us
off with the second or middle door" and then the
warehouse and then the first door. Giannino

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Page 7 M.P.

made no bones about it and gave it to us in the order we wanted them.

The next day, a day after that, $1500 was placed in the trunk of Giannino's car, a blue Monte Carlo, not a new car but at least a couple of years old. Giannino had given Garcia a key to the trunk of his car for the purpose outlined above. Garcia gave the key to someone he knows who handled the money payoff and as far as I know the trunk key never was returned to Giannino I do not know where Giannino's car was parked the night the money was placed in the car trunk but I do know it was close to the jail. I saw the trunk key and it was silver in color but worn, revealing yellowish spots of tarnish.

Giannino asked Garcia for the other $3500 and was promised by Garcia that he would get it. Giannino said he trusted Garcia as a man and felt secure and confident that he would get his money, all his money. Within 7-10 days Giannino turned over to Garcia the impressions, in st profoam, of the warehouse key in the same manner as with the second door. The day following the receipt of the impressions of the warehouse key I told Garcia that he would

3500 Material.

Page 8 M. P.

have to go back to Giannino and get him to make a tracing of the warehouse key and make notations about the dimensions of the key. The reasons I needed the tracing and dimensions was because even though I had filed down another piece of the brass strip referred to on page 2 and had made a key which fit perfectly into the styrofoam impression the key to the warehouse did not work. The key that I made from the impressions of the second door worked and therefor it was not necessary to have a tracing of that key. So Giannino made the tracing of the warehouse key on a 4 x 5 piece of paper the color of which I cannot recall and made notations similar to those I made on the sketch of the first key.

After receiving the tracing of the warehouse key I filed down my homemade key a little more and tried it in the door while working in the first floor sanitation area where I was assigned work. I was finally able to get the key to work in the warehouse lock and Harry Lupper also tried it and it worked for him also.

We kept telling Giannino that the boys are over trying to make over not working while actually

M. P.

M. P.

the keys made by me from impressions of the ground and warehouse door were sufficient and opened the doors. By telling Giannino that they had not been successful Giannino did not pressure Garcia for more money.

After receiving the impression for the warehouse door Garcia told Giannino that they wanted to wait a while for impressions of the first door but actually, at this point, 2-3 weeks prior to Sept. 22, 1974, all three keys were completed and worked. Giannino was never told that the keys worked in the locks.

Barrera, Lopez, Ficarri, Bernstein, Luppino and Garcia all had knowledge of the keys, and that they were being made, in addition to myself. Then on four days prior to Sept. 22 we all sat down and decided to arrange Sunday, Sept. 22, 1974 because it would be a quiet day and not one would be working in the warehouse. No other inmates knew of our plans.

I want to also mention that around this time of the escape Giannino was having physical problems with his leg and had been admitted to the hospital for a day or two and then came back to work. Giannino then had to take, more

M.L.

time off from work because of a leg problem which causes him to walk with a limp. Giannino is in his middle twenties, 5'9", 160-165 lbs. black hair, wears eye glasses, clean shaven. Hanni also told [illegible] one person in Giannino's family, possibly his mother in law, was injured in an auto accident.

On Sept. 22, 1974, starting about 9:00 am I made several attempts to open the first door with my homemade key but it wouldn't open probably due to nervousness on my part. I tried unsuccessfully for about one hour. The sergeant then went upstairs to the third floor after the population had been fed and returned to the first floor area at about 12:30 pm and after one more unsuccessful attempt at about 12:30 pm I tried again at 12:40 or 12:45 pm and the door opened. I had stationed some of the seven officers around the area to be sure no guards were nearby and when I successfully opened the first door the other six men followed me. To my knowledge no other inmates witnessed the above. I don't remember who had the key to the second door but the key successfully opened that door on the first try. I thought the second door was locked behind us

M.P.

us beat I am not sure. The third door was opened by one of us, I can not remember which one, and we were then in the warehouse.

I recall that about 12 noon, prior to the escape, I heard inmate Simmons being paged and instructed to report to the first floor and because I knew he was a computer operator in the warehouse I interpreted that to mean that someone must be working in the warehouse area. But since we had already made up our minds to go we were determined to escape regardless of the fact that someone was working in the warehouse. I figured Simmons and the other person upstairs in the business office over the warehouse might hear the electronic overhead door open but I decided to take a chance.

When we got into the warehouse we walked over to the electronic door, I pushed the button and actually pushed the down button as the door was going up but it did not stop & come back down. We ran up the street where I had a car waiting for me and the other six were picked up by a truck with a 14 foot body, painted silver. I had arranged to have the car left for me with the keys left in the ash tray and a change of

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Page 12

M. P.

2 clothes. I immediately drove over the Queensboro Bridge and to Northern Blvd. As I drove east on Northern Blvd I threw my prison pants, with the key to the first door in the pocket, out the window but over the top of the car near a vacant lot on the right side of the street. The location was 3-4 blocks past the elevated subway.

I want to add that the other two keys I made were left in the possession of the other escapees. The keys were similar in color to the instrument in keys.

M. P.

I have read the above statement consisting of two pages and declare them and declare them and declare them to be true and factual to the best of my knowledge.

Witnesses.

Edward L Breen Special Agent FBI - 10/11/74

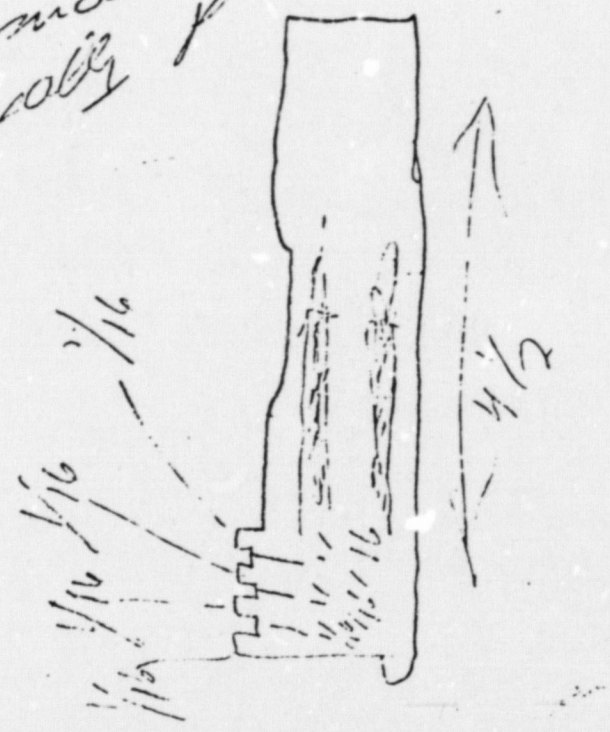
Edward J. Scholay, Special Agt. FBI, NY NY 10/11/74

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Exhibit A

This sketch was drawn by me 10/11/74 of the bag I made for the first coal pour



Mark Reno

3500 Material.

ERROGATION; ADVICE OF RIGHTS

EXh

YOUR RIGHTS

Place N.Y. N.Y.
Date 10/22/74
Time 8:15 AM

: ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: Edward J. Holiday SA, FBI, NYNY 10/22/74

Witness: Robert F. Kaminsky, SA, FBI, NY, NY 10/22/74

Time: 8:16 AM

STATEMENT

MP

MP "I, Mario Anthony Perna, have been made aware of the identity of Special Agents Edward J. Holiday and Robert F. Kaminsky, whose names appear as witnesses on this page, and of the nature of questions they desire to ask me which relate to my escape from the Federal House of Detention in New York City on September 22, 1974, and prior events connected to that escape.

MP

MP

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3500 Material.

"I make the following statement freely and voluntarily and wish to make clear at this time that this statement is being made by me to further clarify and add to statements made by me on October 11, 1974, and October 13, 1974. Further, I am making this statement at this time to disclose the involvement of members of my family, friends, associates, and a member of the clergy, which I previously had desired to protect.

"My earlier statement concerning obtaining and using a brass plate taken from a stair at the Federal House of Detention was fictitious. Furthermore, I did not make the second and third door keys from impressions supplied by Correction Officer Giannino. As I indicated earlier in this statement I fabricated information concerning the brass plate and the fact that I made the second and third door keys in an effort to misdirect the investigation so as to avoid implication of the people I referred to above.

"In June or July of 1974, while an inmate at the Federal House of Detention in New York City, I did make the first key to the first of three doors necessary to negotiate for a successful escape; however, the key I made did not work and I discarded it. That first attempt was made by using a scrap piece of brass supplied to me by inmate Fiocconi, who later escaped with me. I then made another attempt at the first door key by using a file to gouge channels into a piece of metal. No guard aided me in my attempt to duplicate the first door key and I merely closely observed that key on the keyring hanging from the guard's belt, over a long period of time. After starting construction of this key, inmates Luppes and Fiocconi asked me to attempt to line somebody up, namely a locksmith, to assist us. At about this time I was visited by my brother, Pasquale Perna, whose nickname is Patty, age 50 or 51, who resides at 5 First Street, Harrison, New York, and during my visit with my brother we discussed having a key made. My brother said he thought he knew someone who might be able to make a key. A short time later I was visited by my girlfriend, Yvonne Cruz, and during that visit, which was a contact visit, I gave her a drawing which included dimensions of the first door key, which I obtained only through visual observation of that key, and by using tongue depressors, cheese and bread dough to obtain dimensions. Yvonne gave the drawing to my brother, Pasquale, and he in turn contacted a locksmith, who I do not know but who is known to my brother and to Yvonne. I do know that the locksmith is an elderly man, retired, who resides in Harrison, New York or New Rochelle, New York.

is a crime in and of itself separate and apart from the crime of importation, purchase, sale, and transportation of narcotics.

I can hear you almost say "If you say that again I am going to scream, Judge."

I hope that's the last time. The rule is otherwise, however, with regard to the substantive violations of the narcotics laws, about which I am now instructing you. Here you must be convinced beyond a reasonable doubt that the substance possessed or distributed was in fact a narcotic drug.

It is not necessary that that be proved by direct evidence. Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence. There need be no sample placed before you, nor need there be testimony by qualified chemists, as long as the evidence furnishes ground for inferring that the material in question is narcotics.

There are several categories of circumstantial evidence which you may consider as to whether a given defendant has possession of the narcotic drug as charged in each substantive count. One, the testimony that someone had personally tested samples of the powder from each shipment.

mdbr 22

Two, the secrecy and deviousness with which the transactions were handled, such as code words, concealment of the substance, and so forth. Three, the fact that the substance in which they were dealing was a white powder. Four, the high prices paid in cash for the substance.

Five, the lack of complaint on the part of the purchasers. Six, descriptive language used by certain transactions. Seven, the white powder in evidence which counsel stipulated to be heroin hydrochloride.

My throat is getting a little sore. We will take a few minutes recess.

(Recess.)

Before I conclude this portion of the charge there is one other statute that I must discuss with you.

It is not necessary for the government to show that the defendant you are considering physically committed the crime himself. It is also a crime, however, not only to commit the illegal acts to which I referred but to aid or abet or procure or induce another person to commit such acts. That is based on what we call the aiding and abetting statute, and it is very simple. Here it is:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

mdbr 23

That statute, therefore, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find a defendant guilty of the offense charged in Counts 2, 3, 4, 5, 14, 15 and 16 of this indictment if you find beyond a reasonable doubt that another person committed the offense charged in those counts and that the defendant you are considering aided and abetted that person in effectuating it.

To determine whether a defendant aided and abetted the commission of an offense you should ask yourself these questions. Did he associate himself with the venture, did he participate in it as something he wished to bring about. Did he seek by his actions to make it succeed?

If he did, then he is an aider and abetter.

Of course, to find a defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that a crime was being committed. For a mere spectator, as I have told you already, it not a participant. But in order to convict it is not necessary that you find that a defendant himself did all of the criminal acts since participation in the crime can be found if you find he aided and abetted, in other words, that he assisted another in committing it.

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mdbr 24

After all, it is not uncommon that in any combination of persons, to achieve a common goal, legal or illegal, each person has a different -- and I keep repeating this -- not a duplicating job to do in going about the attainment of the common purpose.

So the law provides that anyone who knowingly aids or abets another in any manner in the commission of a crime is equally guilty of the commission of that crime and is himself a principal and may be charged directly with the commission of a crime as principal and convicted upon such charge, although the evidence indicates that he only aided and abetted in the commission of the crime, and did not have a major part in the undertaking.

He aids and abets if knowing the crime is being committed what he does actually helps make it possible or cause the commission of the crime.

Now let us go further . Counts 2, 3, and 4 of theindictment charge Joseph Mangano, Frank Pallatta, Richard Bolella, and five others who are not on trial, with the substantive offense of distribution of heroin and possession with intent to distribute heroin. There is another way that you may find these defendants guilty of these three substantive counts besides under the principles I have just given you relating to aiding and

mdbr 25

abetting.

If you find that a conspiracy to distribute heroin existed, that these three defendants were members of it, and that the offenses charged in Counts 2, 3 and 4 were actually committed by another member of the same conspiracy in furtherance of the overall plan, you may find these three defendants guilty of these substantive offense, even if they were not physically present at the time that the offenses were committed.

In other words, if you find beyond a reasonable doubt that the persons identified as Skooch and Charlie were members of a conspiracy to distribute or sell heroin along with Magnano, Pallatta and Bolella you may find Magnano, Pallatta and Bolella guilty of these three counts if you determine that Skooch, or Charley physically distrib uted the heroin in furtherance of the conspiracy.

The same principle applies with respect to Count 9. This count charges the defendant Soldano and another person who is not on trial, Joseph Malizia, with distributing and possessing with intent to distribute three kilograms of heroin.

You will recall that government witness Verzino testified that Mr. Soldano sold him this heroin, and that the actual delivery took place in Queens,

New York, Queens, New York, is not in the Southern District of New York. You may find Soldano guilty of this charge, however, if you find beyond a reasonable doubt that he was part of the conspiracy to distribute heroin along with Verzino and that he sold this to Verzino and that Verzino took the heroin into the Southern District of New York, which includes Manhattan and the Bronx, with the intention of distributing it. In other words, if you find that Soldano was a member of the conspiracy as charged alohg with Verzino, and he gave the heroin to Verzino, and that Verzino took it into the Southern District of New York with the intention of distributing it, you may find Soldano guilty of Count 9.

We come now to the words unlawfully, wilfully and knowingly. They charge the defendants with having unlawfully, wilfully and knowingly committing the offenses set forth there. Although these words define themselves nevertheless they are set forth in the counts of the indictment, they have been repeated over and over again, so as to make certain no one would be convicted because of mistake, inadvertence or other innocent reason. So by use of these words unlawfully, wilfully and knowingly the government must prove beyond a reasonable doubt a specific intent to commit a crime before there can be a conviction as to each

count in theindictment. An act or failure to act is done knowingly if done voluntarily and purposely and not because of some mistake or inadvertence or carlessness or other innocent reason. More precisely what is meant by wilfully in the eyes of the law, means doing an act purposely with bad intent. It means having the purpose to cheat or do a wrong. It means with specific intent to disregard the law or do that which the law forbid. It regards conscious wrongdoing.

On the other hand, wilfully does not mean inadvertence, carelessness or honest misunderstanding of what the law requires.

And so carlessness, and so forth, is not the equivalent of wilfulness.

Wilfulness involves the state of the person's mind, and that is an issue of fact as much as the state of his digestion. It is an issue of fact which you must decide.

Medical science has not devised an instrument which can record what was going on in a person's mind in the distant past or what motivated that person. The state of a person's mind may be inferred from words, from his actions, from his conduct. It has often been said you bring into the jury box with you your common

mdbr 28

sense and the experience of your daily lives in the market place, in your home, in dealing with all kinds of people. That is what makes a jury such a tremendous force for the administration of justice.

What a pity it is if not an annoyance to come in contact with people whose intellectual achievement is restricted to a knowledge of what some books contain. Laden down with acknowledgment of honors at the academy they haven't got common sense, they have no knowledge of human behavior; you can pull the wool over their eyes, just like taking candy from a baby. They don't belong in a jury box. We want people who have lived, who have seen the bitter and the sweet, who can judge human behavior by actions as well as by words, persons who have rubbed elbows with all kinds of people, the mighty and the small, and of learned that courage can be found with the most ignorant person, and found lacking in those who boast of their degrees.

And so you apply that knowledge that has come to you thatmakes you ministers of justice. All that knowledge, that is the reason that you are so powerful. We want that as well as understanding of the law, your knowledge of human behavior. You undoubtedly agree with the great philosopher that books are a bloodless

mdbr 29

substitute for real life, and spare me from those who have nothing more to offer than book knowledge. It is obviously impossible to ascertain or prove directly what was the operation of the mind or the intention of any defendant. But a wise and intelligent consideration of all the facts and circumstances shwon by the evidence and exhibits, the entire trial record in this case, will enable you to come to a conclusion with a reasonable degree of accuracy what were the defendants intentions.

Intent involves a mental attitude with a knowledge of a defendant act, and with a knowledge of surrounding circumstances. You may draw a defendant and logical conclusion. In your every day affairs you are continuously called upon to decide from the acts or actions of others what their intentions are. Experience has taught us that actions speak more clearly than spoken or written words.

You must rely in part on circumstantial evidence in determining the guilt or innocence of a defendant or of each defendant in this case. Proof of the circumstances surrounding a man's actions can supply an adequate basis for a finding that a defendant acted knowing and wilfully. The actions of a man must be set in their time and place, just as the meaning of a word is understood only in its relation to other words in a

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 791-1020

sentence, so the meaning of the particular act may depend on the circumstnaces surrounding it.

Now let me come to another subject, and that is similar acts. Remember we have received evidence on that subject. I want to be mighty sure that that is perfectly clear, too. It deals with the defendant relating to prior similar acts by some of the defendants which occurred prior to the conspiracy alleged in the indictment.

Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done at another time or on another occasion. That is to say evidence that a defendant committed an act of a like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment.

Then how may it be considered, this evidence dealing with prior similar acts? As I told you at the time, and tell you again, the jury may consider that evidence dealing with alleged acts of a like nature solely, solely, solely, in determining the background and development of the very conspiracy embraced within the indictment before you.

Such evidence relating to prior similar acts may not be considered by the jury for any other purpose

mdbr 31

whatsoever.

I emphasize, the jury is not to infer that the defendants had a criminal propoensity or bad character because of that kind of evidence that was received.

Now a few words about what the law means by direct and circumstantial evidence.

I believe in giving examples. I believe in translating and making meaingful the heavy language of the law, and I will do it here again.

I am looking at you. That is direct proof. I see you with my eyes. Suppose I asked the clerk, is the jury here? And he says yes. I don't see you when he tells me that. That is circumstantial evidence that this very same jury is here.

After all, I don't call your names off every single time and look at every single one of you. That is circumstantial evidence that you are here, even though I don't look at you.

Suppose I gave you this language and didn't give you examples. Would you understand it? Generally, the proof offered is of objective facts and circumstances from which one in terms of common experience can rationally and logically include the ultimate fact. But with that

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mdbr 32

example it comes home, doesn't it? I hope. Do you get it? Do you get it? Does anybody fail to get it?

Here is a common example used by judges over and over again.

You came in today. The good Lord was kind and gave us a shining sun, and youare here. And suddenly somebody comes into the room and he is dropping wet, and he sits down and a veritable puddle forms at his feet. You didn't see the rain. That is circumstantial evidence that is has been raining.

If you looked at the rain with your own eyes that would be direct evidence, and that is all thereis to it.

It is rare that there is directevidence on this. Knowledge is generally shown by circumstantial evidence. And so direct evidence is testimony as to what a witness saw, heard, or observed, what he knows of his own knowledge. Circumstantial evidence, on the other hand, rests on an inference. Proof is given of facts, like the umbrella, wet clothing, and one infers therefrom what reasonably follows in the common experience of mankind.

I point out to you that circumstantial evidence, if believed, is of no less value than direct evidence.

There is absolutely no requirement that proof of a crime and a defendant's guilt be by either or both

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

mdbr 33

types of evidence. The only requirement is that the proof, circumstantial or direct, or all of one or all of the other, is beyond a reasonable doubt.

Now we come to accomplice testimony. Parna, Verzino. What's an accomplice in the eyes of the law? I am sure you know it. An accomplice is any person who participates in the commission of an alleged offense.

The accomplice, an associate in performing a crime has the purpose of either promoting, facilitating, incurring or aiding another in committing a particular crime. The fact a number of government witnesses are accomplices or have criminal records is to be carefully considered by you as bearing upon their credibility.

It is to be expected that the participants in an enterprise so unholy and so illegal will not be upright gentlemen.

Nevertheless, that doesn't say that you can settle for less than what the law demands. You must realize, I am sure, that in the prosecution of a trial the government is frequently called upon to use witnesses who are accomplices. Often it has no choice. This is particularly so in case of conspiracy. Frequently it happens that only the members of the conspiracy and he or their accomplices have evidence which is relevant to

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y.

mlbr 34

and important to the case.

However, it does not follow, because a person has acknowledged participation in a crime, or is an accomplice or has a criminal record, that he is not capable of giving a truthful version of what occurred. That is for you to decide.

As with courage, so it is with truthfulness. It frequently comes from the mostly unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche or convincing disclosure gushes forth.

The testimony of such persons, however, should be viewed with caution, must be scrutinized with the utmost circumspection.

The fact that Mr. Amorosa is convinced, the fact that counsel for the defense are not convinced -- in fact, they denounce it with every bit of energy they can bring in back of their words -- is of no concern to me or to you. It is what you think, you the jury. But you must be cautious when it comes to relying on the testimony of a wicked person who is an accomplice. What I am emphasizing is that that particular element or elements does not automatically nullify them, but you have to decide

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

mdbr 35

that issue, and so you will consider whether the testimony was inspired by self-interest, personal advantage, hostility, or whatever other human factors may be involved. You should consider whether the testimony of such a witness was a fabrication induced by a promise or even a belief that they will receive favorable consideration in their respective cases.

There is no requirement in the federal court that the testimony of an accomplice be corroborated. Conviction may rest on the uncorroborated testimony of an accomplice, if you believe it and find it credible.

To acquit a defendant you need not find that any witness against him has lied. The test always is "are you satisfied beyond a reasonable doubt from the entire record in accordance with the Court's instructions of the guilt beyond a reasonable doubt of each of these defendants on trial?

So if you find the testimony of any of these accomplices was deliberately untruthful, reject it. If upon acautious and careful examination you are satisfied that the witnesses have given a truthful version, and the government has sustained its burden of proof beyond a reasonable doubt, in all other respects as outlined in my instructions, then you have sufficient proof on which to bring in a

mdbr 36

verdict of guilty. Otherwise, the defendants are entitled to an acquittal.

Evidence that a person has been convicted in the past of certain crimes may be considered by you in determining the witness' credibility by which is meant his worthiness of belief.

As you contemplate the testimony before you of a confessed perjurer, of a confessed accomplice, I would suggest you might consider whether he presented an instance of purge or perjury.

Doesthe witness purge himself? Has he for the moment pushed aside all the rot in the make-up? That is possible. Or is this a Machiavellian approach for a very personal reason. You have no concern with the government's estimate and no concern with the estimate by counsel for the defense. I venture none. I just suggest to you guides for the weighing of testimony.

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The government contends that there is aside from that kind of testimony from these accomplices, Perna and Verzino, other proof which you may regard as a reliable character in support of the indictment. Its veracity or believability is an issue that can be resolved by the jury.

I would say to you, your greatest challenge is your evaluation of the testimony as it came from the lips of witnesses and your estimate of the exhibits and the stipulations.

It is your estimate of the testimony given by the witnesses, and each of them, that is controlling. Quality of proof is really the test. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. In weighing the effect of such a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or from wilful falsehood.

If you find that any witness has wilfully testified falsely as to any material fact, you may reject all the testimony of that witness, or you may accept such portion or part which commends itself to your belief.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

mmbr 2

In sizing them up in your search for the truth, you should be guided by your plain, every day common sense. You saw each witness, you observed the manner of his giving testimony. Out of the welter of testimony you are called upon to determine the factual issues in the case. Thus, upon all the evidence, you, the jury, are to resolve the conflict.

To acquit a defendant, ladies and gentlemen, you need not find, I repeat, that any witness against him has lied. The test always is, are you satisfied beyond a reasonable from the entire record, in accordance with the Court's instructions, of the guilt beyond a reasonable doubt of the defendant on trial.

If upon a cautious and careful examination you are satisfied that the witnesses have given a truthful version and the government has sustained its burden of proof beyond a reasonable doubt in all of the respects as outlined in my instructions, then you have sufficient proof on which to bring in a verdict of guilty. Otherwise, the defendants are entitled to an acquittal.

Ask yourselves, "How does his testimony," referring to every witness, "impress me?" What degree of credit you should give the witness' testimony should be determined by his conduct, his manner of testifying, his relation

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y.

mmbr 3

to the controversy, his bias or impartiality, and the reasonableness of his statements. Is the witness interested in the outcome of the case? Is there a motive to testify falsely? Was the witness mistaken? Was he correct?

In other words, whatyou try to do, to use the vernacular, is to size up a person, just as you would in any important matter when you are undertaking to determine whether or not a person is truthful, candid and straightforward.

A witness may be discredited or impeached by contradictory evidence that at some other time he has said or done something or failed to do or say something which is inconsistent with his present testimony. The testimony of any witness whose self-interest is regarded convincing to you is to be considered with great caution and weighed with great care. You should consider the witness' intelligence, motive, state of mind and demeanor while on the stand. You should consider his candor, or lack of candor, his possible bias, his means of information, and the accuracy of his recollection. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give that witness' testimony such credibility as you think it deserves. Your determination of the

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credibility of a witness very largely depends upon the impression he made upon you and the conviction with which he testified, the way he testified. Did it come over to you? Did it impress you? Did it touch you? Did it affect you? That is for you to consider, not how that witness impresses any of the rest of us.

The fact that a witness is an official or an employee of the government does not mean by itself that you should give greater or special credit to his testimony. The testimony of any such witness should be weighed and scrutinized in the same manner as any other witness who has testified in this case. You judge their testimony in the same way, taking into account interest or any factor which may have influenced them to color or fabricate their testimony.

Examine with care for the clean or impure motive that prompts the testimony of a witness. Ask yourselves after each witness, "What was the witness' motive? Did the witness commit perjury in order to get the defendants convicted? Or was his testimony induced by an unflinching desire to tell the truth. Ask yourselves whether the testimony was adduced because of dislike of a defendant or revenge, or for any other impure motive. Does the trial record point to a wrongful reason which would

mmbr 5

prompt the testimony? Or do you believe that a witness testified as he knew the facts to be and scrupulously observed his oath? All of this is for you to evaluate.

So, you see, a study of the motive for testimony may be a strong indicator, if not a conclusive one, as to where truth lies and falsity exists.

Several prosecution witnesses signed agreements with the government wherein they agreed to do various things in exchange for certain consideration from the government. Specifically, in those agreements they agreed to testify truthfully, in good faith, and to reveal in full their total involvement and all their associates in the crimes charged. These agreements are not any evidence whatsoever that those witnesses have, in fact, told the truth, or testified in good faith, or have revealed their total involvement in the crimes.

Whether or not the witnesses have testified truthfully, fully and in good faith from the witness stand in this case is a question of fact which only you, the triers of the fact, can decide.

2 You have seen very clearly that six of the defendants did not take the stand. What has the law to say? There have been some words as to why. Disregard all that. I allowed it because there was no particular

mmbr 6

objection at the time. But we are not concerned with whether or not or what induced or what prompted a defendant not to take the stand. Look at the law, just be guided by the law. A defendant has an absolute right to remain silent. He has an absolute constitutional right to sit throughout the trial from start to finish without uttering a word or presenting a word or a syllable of evidence in his behalf; he has a right to demand that the charge be proved beyond a reasonable doubt without his participation. No defendant in a criminal case is required to testify.

These are propositions of law, and I hope I have convinced you how meaningful they are to a Judge. Whether they favor a defendant or favor the government, that is the law. These propositions of law are bigger than you and bigger than counsel and bigger than all the people in this room, including the Judge. On their preservation depends our destiny. If you don't think that keen observers of the scene in America think that the day is not too far off when there will be an invasion of the holy ground on which justice predicates and holds firm, as with hoops of steel, these principles of law, you are mistaken.

So if you as much as have a shadow cross your mind against any defendant because of his failure to testify, you yourself would violate your oath. You cannot

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK NY 791-1020

mmbr 7

disreg ard these instructions or any of them. And so I repeat to you that a defendant in a criminal case does not have to testify, and the fact that he does not testify or even if he called no witnesses whatsoever cannot be held against him in any respect.

if you will remember what I told you earlier, you will see how this naturally follows. Since the burden of proof rests upon the government and never shifts, a defendant need not take the stand or call witnesses. Itstill remains the burden of the government to prove the guilt of the defendant beyond a reasonable doubt. And so I repeat, in no respect might the fact that a defendant has not testified enter into your deliberations, nor may you draw any adverse inference against him by reason thereof.

All of life is a sort of game, and in the game you have certain values to each piece. The presumption of innocence is a big piece in favor of a defendant. The presumption that I have just announced is also a piece in the game of life, and a clean game, not a crooked game, and you give those factors their appropriate value. But that does not prevent the government, if you think the government has done so, from adducing proof which nevertheless may satisfy you beyond a reasonable doubt as to

the guilt of the defendant.

What about a defendant who did testify? Two of them took the stand. What has the law got to say as to them? As to DeLutro and Gwynn?

The law permits, but does not require, a defendant to testify in his own behalf. The testimony of DeLutro and Gwynn is before you. You and only you can determine how much credibility or believability their testimony is entitled to or how little.

However, I instruct you that it is the law that interest creates a motive to give false testimony, that the greater the interest the stronger is the temptation, and that the interest of a defendant in the result of a trial is of a character possesed by no other witness and is, therefore, a matter which may affect the credence which shall be given to his testimony.

However, let me point out that the fact that the defendants DeLutro and Gwynn have such an interest in the case does not mean that they will testify falsely. It is for you, the jury, to decide whether they testified truthfully and how much weight to give to their testimony.

Now a few words as to inconsistencies -- and I am not far from completing this charge.

Where a witness has been impeached on the basis

mmbr 9

of a prior inconsistency, or inconsistent statement, he may always endeavor to explain away the effects of the supposed inconsistencies by relating whatever circumstance or circumstances would remove it.

Thus, fear of consequences of plain speaking, such as personal safety of one's self is such a circumstance and may be considered by the jury in evaluating the reasons for the inconsistency.

An expert was called to the stand, a handwriting expert. He offered testimony under oath. A word or two as to the law with regard to such a one.

Witnesses who by education and experience have become expert in some art, science, profession, or calling may state an opinion as to relevant and material matter in which they profess to be expert, and may also state reasons for the opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves.

If you decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, youmay disregard the opinion entirely.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Now a few words as to a prior conviction. The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment of a witness.

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Now a few words as to the use of informants. There has been testimony with respect to the use of persons sometimes referred to as informants or informers. These services are availed of by government agents at times to obtain introductions to persons suspected of violating the law. There are certain types of crime where, without the use of informants, detection would be extremely difficult. Frequently, it is necessary to get leads for introductions to persons allegedly engaged in illegal activities or otherwise to aid enforcement officers. The law from time immemorial has permitted the use of informers, provided the rights of a defendant are not violated. Whether or not you approve the use of an informant in an effort to detect law violation is not

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mmbr 11

to enter into your deliberations. I will tell you -- I don't mind including this -- that the representatives of the government to use informants sometimes take their lives into their hands. It takes courage to deal so ofte with these despicable characters in order to know where the fire is going on and where the rot exists and where the cash or the secret hiding places can be found. You are not going to go look for it; someone has to. The question is, what was done here in this case? Was it done with that kind of high motive or was it not? Was there pollution that runs amuck here, or is it confined? Or is there any, really, when you come to add up all the evidence?

There is no presumption against the government from its failure to call a witness when it appears that his testimony would be merely cumulative or repetitious and of no greater value than that of witnesses who have, in fact, testified.

Whenever a person is equally available to both sides to testify, that is, when he can be subpoenaed to testify by either the defense or the government, and neither side calls him as a witness, you are not permitted to draw any inferences against either the defense or the government for their failure to call that person as a witness.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. 791-1020

mmbr 12

You may not draw any inference, favorable or unfavorable, towards the government or the defendants on trial from the fact that certain persons were not named as defendants or, having been named, are not on trial before you now. Those matters are wholly outside your concern and have no bearing on your function as jurors.

Now I bring the charge to a conclusion. Ladies and gentlemen of the jury, when will you lay down as law the letter, the spirit of the law, that a defendant is presumed to be innocent until the government fulfills its obligation proving him guilty beyond a reasonable doubt, and all those other propositions of law that I have tried to emphasize and to delineate for you, each one equally sacred, we must not lose sight of the rights of the other party in this litigation, the plaintiff, the government. We must bear in mind, and I so charge you, an equally vital concept of justice, defined in classic fashion by the Supreme Court of the United States, and hence the law of the land, ... justice though due to the accused, is due to the accuser also.

If you find the law has not been violated, you should not hesitate for any reason to return a verdict of not guilty. That wouldbe your sworn obligation. But, on the other hand, if you should find that the law has

mmbr 13

been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty because in your concept of what is required here that would be the justice of the case, if you so decide. And if that is your decision, it will also constitute a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this.

All of these things that I have mentioned follow only if, as and when you are satisfied beyond a reasonable doubt as to each of the elements which I told you the law makes imperative in order to sustain each of the counts set forth in the indictment.

Under your oath as jurors you cannot and must not allow a consideration of the punishment which may be inflicted upon a defendant if he is convicted to influence your verdict in any way. If you did that, you would clearly violate your own oath. That duty rests exclusively with the Judge, who, upon the basis of a full official report dealing with the defendants general life pattern of behavior, imposes sentence.

The indictment names these eight defendants. In determining the guilt or innocence of each of these eight defendants, you must bear in mind that guilt is

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

personal. Indeed, I told you that, and I want to say it over and over and over again. You got to look at the evidence as it relates to Magnano, you got to look at the evidence as it relates to Pallatta, you have to look at the evidence as it relates to each one, add it all up, all the evidence. You don't take one piece of evidence and say, "Does that satisfy me beyond a reasonable doubt?" Of course not. It has a value. How much weight do you give it? None at all? A little bit? A whole lot? You take this piece and that piece and that piece. Ask yourselves when you add it all up as to a particular defendant, is he guilty or is he not guilty. Then you go to the next one and the next one. You apply the same test.

Once in a great while I get a note from a juror because I did not make it clear, and everyone does not speak up, does not say, "You know, I am really not that well informed." Who does that? How unusual is it for a person to confess his limitations. The guise under which so many people operated. Then when they get called to account, they flop on their faces. Up to that moment they have gotten away with it -- silent gesture, a knowing look. And then all of a sudden they reveal their true selves, empty, low, contemptible. And there is a

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 791-1020

great revulsion that ensues.

Remember that guilt is personal. The guilt or innocence of each defendant on trial before you must be determined separately with respect to him, solely on the evidence presented against him, or the lack of evidence.

I repeat, the indictment is in 17 counts, but you are to consider only 13. Each count charges a separate crime. There are facts and elements common to more than one count. But you must consider each count separately as to each defendant and return a separate verdict of guilty or not guilty for each count and each defendant in the indictment.

The verdict, whether for acquittal or for conviction, must be unanimous. Each juror is entitled to his own opinion. You should, however, exchange views with your fellow jurors. That is the very purpose of jury deliberation, 12 jurors, not one, not three, not five, 12.

You have a right to your opinion, but you must discuss it with one another; you must give each the benefit of your views.

And so the law says that you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach an agreement based solely and

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

mmbr 16

wholly on the evidence, if you can do so without violence to your own individual judgment, and to employ that high degree of genuine courage you justifiably expect, especially in these perilous times, from your public officials.

You should not hesitate to change an opinion, which upon a consideration of all the evidence with your fellow jurors, appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed.

The exhibits and a copy of the indictment will be sent to you promptly.

If, to help you in your deliberations, you wish a point or points in the testimony read, please specify exactly as possible just what point you wish the official reporter to locate, and it will be read to you, no matter how much time it takes.

Your oath, ladies and gentlemen of the jury, sums up your duty, and that is without fear or favor to any man you will well and truly try the issues between these defendants and the United States of America according to the evidence given to you in open court and the laws of the United States, and that is what you swore to do.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. -- 791-1020

mmbr 17

I have every confidence that you will fulfil your sworn obligation as American ministers of justice to render a true verdict based solely and exclusively on the facts and on the law in this case.

If the government has carried its burden in accordance with the evidence and the law as to the defendants, you must not flinch from your sworn duty, you must convict. But if it has failed to carry its burden as to a defendant, your sworn duty is to acquit. And this I say to you with measured tones: You have undoubtedly talked about justice in your homes and in your daily affairs, in your comings and your goings, as is your inalienable right. The point is that now each of you sits in the seat of justice. How will you do? Apply your criticism to yourselves. Will you call them as you see them? Will you do justice as between the government on the one side and the defendants on the other solely on the facts and on the law? This Judge has every confidence that you will do exactly that.

Marshal, will you take the jury to the jury room.

(Jury excused.)

THE COURT: Are there any exceptions or requests by the government?

MR. AMOROSA: No, sir.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. 791-1020

mmbr 19

prior similar acts, as set forth in the record by me earlier. The introduction into this case --

THE COURT: You have already elaborated on that, and I know whatyou refer to. Tell me what else you have?

MR. EPSTEIN: May I have a moment, your Honor?

Your Honor, the only additional exception to the Court's charge, your Honor charged the jury that in considering the substantive counts they could find that someone was guilty if he were in actual or constructive possession of the contraband as set forth in the substantive counts. Your Honor, I submit under the statutes which are involved, the proper charge to the jury is on aiding and abetting.

THE COURT: Very well. Exception is noted.

MRS. OBERMAN: Your Honor, most respectfully on behalf of the defendant DeLutro we except to your Honor's charge as to the second element of the conspiracy, that whether a defendant is a member of a conspiracy is a fact to be drawn from all the evidence in the case, and again, your Honor's statement that the only way of determining if the defendant entered into a conspiracy is to take into account all the facts and all the evidence in the case. We submit that the proper statement of the law is contained in DeLutro's request 14, that as to this element the defendant's own actions and own conduct and own state-

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 791-1020

mmbr 20

ments must be considered.

THE COURT: Very well.

MS. OBERMAN: I have other matters.

THE COURT: Go ahead.

MS. OBERMAN: Your Honor, we also object to your Honor's charge that when the government throws out the net and that an occasional minnow may well go free, in the context of this case, your Honor, most respectfully it could convey an impression of big fish versus little fish, and that, I think, was the ground for a motion for the severance.

THE COURT: I get your point. What else?

MS. OBERMAN: On the example as to circumstancial evidence --

THE COURT: You take exception to what I said about circumstantial evidence. What else?

MS. OBERMAN: Your Honor, you charge that a defendant who testifies in his own behalf may have a motive to give false testimony and that the interest of the defendant is like that possessed by no other witness.

THE COURT: That is the law.

MS. OBERMAN: Most respectfully, your Honor, we believe --

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

mmbr 21

THE COURT: You take exception?

MS. OBERMAN: Yes.

THE COURT: That is it.

MS. OBERMAN: And especially, your Honor, in light of the instruction given as to the accomplice testimony, that when you weigh one against the other, the defendant comes off much the poorer, although the accomplice has an equal motive to falsify.

THE COURT: Very well.

MS. OBERMAN: And we adopt also, of course, the objections heretofore noted.

THE COURT: Anything else?

MR. BLOSSNER: Your Honor, the defendant Soldano respectfully requests as to the model instructions as to the identification testimony and as to photographic identification, which I believe --

THE COURT: You take exception to that?

MR. BLOSSNER: Yes.

MR. HOFFMAN: Respectfully, your Honor, on behalf of Mr. Lucas I except to the following --

THE COURT: Please don't make elaborate speeches on this. Just mention the point, because it is now 7:30, and I would like to have the jury on their way. I don't want to cut anybody short. I don't want any expansion of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

mmbr 22

a thought that I immediately get.

MR. HOFFMAN: I join in the previous exceptions.

I except to the charge concerning defendants not taking the stand.

I except to the charge with regard to the statement that the public is entitled to be assured that crimes of this character cannot be committed with impunity.

I except to your Honor's statement of the fact that when Mr. Lucas' house was searched, or words to that effect, he was found with $585,000 and drugs were found in possession of Mr. Lucas. Specifically there is no basis for that; there is no evidence of any drugs found in Mr. Lucas' house or his possession.

THE COURT: Wait a minute? Did I say drugs were found there?

MR. AMOROSA: I have no recollection of your saying drugs, but Mr. Virella has some recollection of your saying drugs. I thought you said money.

THE COURT: I said money and the envelopes, the bags and the machine, sealing machine. I will tell the jury if I said anything about drugs being in Mr. Lucas' possession, that there were none. I will straighten it out now.

MR. HOFFMAN: I would respectfully request

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

that in straightening it out that you merely say if you stated there were any drugs found there, that was a mis-statement.

THE COURT: I want to tell them exactly what I understand to be the evidence, and I intend to straighten it out. I don't believe in playing around with a jury.

MR.HOFFMAN: I respectfully except.

THE COURT: What is it now, Mr. Epstein?

MR.EPSTEIN: Forgive me. I overlooked one exception. I take exception to your Honor's accomplice charge, to your Honor's instruction to the jury on how to treat accomplice testimony. Your Honor should have instructed them as in United States v. Padgent, as set forth in my original request.

THE COURT: Is there anybody else who has an exception or a request?

MR. AMOROSA: Judge, I think on behalf of the government something should be said to the jury with respect to the identification of the defendant Soldano. I don't believe that your Honor said anything with respect to his identification procedure in this case.

THE COURT: I don't see that that particular item requires any degree of proof greater than any other factual matter. Do you think it has to be established beyond

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FORTY FOLEY SQUARE, NEW YORK, N.Y. 10007

a reasonable doubt?

MR. AMOROSA: Yes, sir, that is certainly the case.

THE COURT: What is it thatyou want? Is there any portion of the request that you want me to give?

MR.AMOROSA: Yes.

THE COURT: What is it?

MR. AMOROSA: Does your Honor have the request before him?

THE COURT: Just read it to me, sir.

MR. AMOROSA: Identification testimony is an expression of belief or impression by the witness. It's value depends on the opportunity on the opportunity of the witness to observe the offender at the time of the offense and to make a reliable identification later.

We believe that that should be told to the jury.

THE COURT: Very well, I will so charge.

What else is there?

MR. AMOROSA: That, in substance, need all be said in our opinion.

THE COURT: Bring in the jury, marshal, please.

(Jury in box.)

THE COURT: Ladies and gentlemen of the jury: There are one or two things I would like to add. It has been called to my attention that through inadvertence

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

mmbr 25

I refer to drugs being found on the premises with the $585,000, at the home of Mr. Lucas. I was wrong if I said so. I certainly did not intend to. What I undoubtedly wanted to say was, No. 1, $585,000 in cash; No. 2, the material used for those bags, whatever you call that material. You remember it was shown you. I have forgotten the name of that kind of material. I know you know what I am talki about. And that can of lactose. And then, finally, that sealing machine, all of which was introduced in evidence. And so please put that in the place of what I said.

You remember that Mr. Blossner on behalf of the defendant Soldano argued that the beginning and throughout the trial, and certainly during summation, on the issue relative to identification of his client. You remember that he introduced into evidence that book of pictures, and I neglected, or if I didn't neglect, I want to rectify the omission of the following words with regard to that particular defendant:

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the events and to make a reliable identification later.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

mmbr 26

Is that what the government consents to?

MR. AMOROSA: Yes, sir.

THE COURT: Very well.

Now, ladies and gentlemen, the marshal will take you to dinner. Take your time. I would like all of you, the 16 of you, to go to dinner, and then return here.

And the moment they return, Marshal, the 12 jurors are to go into the jury room to enter upon their deliberations. Then the alternates will be excused.

You understand what I am saying. I ask you to be good enough as alternates to go along with the jury, not talk about the case during dinner, and return. Why does the Judge say that? Well, these are practical things. They happen once in a while. Suppose one of the jurors, God forbid, does not feel well. He comes back and is unable to carry on before the jury enters upon its deliberations. I would like to relieve that juror and have one of the alternates take over. That is a very selfish reason, but a very necessary one. I know of no other reason, other than the pleasure of having you with us as long as possible. That will permit me to impose upon you. And so, will you please do that, unless there is some great disadvantage, and I take it there is none. I asked the clerk to find that out, and he

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 791-1020

mmbr 27

assured me that all is well on that score. I may not see the alternates when they return. I do not want to get off the bench without saying a word to each of you. These things are meaingful to me. I know other people take these things in stride, they take out of a human being all they can exact; they can't duplicate, they don't have what it takes to duplicate it; they think it is a lot of nonsense, a waste of time; they have not got the capacity to do it, and they just dislike everybody who does.

But may I say to you with all the sincerity that I can summon, that I am indebted to you for the inspiration that came to me as a Judge to see how each of you clung to each word and showed the spirit of caring. You really care about what it is that brings us together, and that notion or that caring is a great cement that holds all these parts together. It is really the basis of all religions. And so you go with the thanks of the Court. Your contribution is enormous; it typifies what each of you has demonstrated. Thank you.

We will announce a recess.

(The jury retired to go to dinner at 7:30 p.m.)

(The jury returned to the jury room at 9:00 p.m., at which time the alternate jurors were excused, and the jury commenced its deliberations.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

court include in appendix from 4132 here on

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(The following took place at 9:50 p.m.:)

THE COURT: It is now 10 to 10. About 9:35 I received the following note from the jury:

"Judge Cooper:

"The jury would like the following:

"1. Copies of the indictment.

"2. Copies of charges.

"3. Pads and pencils.

"Thank you.

"Sheila Simon, Forelady."

The clerk tells me that item 3, pads and pencils, have already been sent in, and there seems to be some dispute as to the indictment.

Now, what is wrong about sending in the indictment? What is the government's position?

MR. AMOROSA: We think the entire indictment as it stands now can be sent in. In my opening remarks I referred to these other counts.

THE COURT: I did, too, in my charge. I had to read them in order to tell them exactly what was charged with regard to the conspiracy.

What is the defendants' position?

MR. EPSTEIN: Most respectfully, when your Honor read the substantive counts, your Honor omitted

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

mmbr 29

Counts 11, 12 qnd 13, which counts refer to defendants who have been severed. A copy of the indictment should go to the jury, and as to the counts which are not before the jury, there is no reason for those counts to go to the jury.

THE COURT: It is an unnecessary burden. No. 1, you got to delete them; No. 2, I can't see how that can be prejudicial one way or the other, the fact that there are three other counts. There are a lot of people mentioned here who are not accounted for in any way so far as the jury is concerned. Of the whole group only eight are on trial, and I have already read substantial parts of it. I can't see that is enough of an objection. I am going to rule the whole indictment goes in. They have the overt acts and everything else.

MR. J. PANZER: May we just cross out those counts that are not to be considered by them, because they may become confused.

THE COURT: Don't worry about that. If I thought there would be any prejudice, I would go along with you. But I have been rattling off names that are unknown to them that were mentioned from time to time, names of those who are not on trial right now; and I can't see that adding the same recital with regard to three other counts

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 10007

mmbr 30

makes any difference at all. There is no prejudice there. Send it in.

They say copies of charges. What I think they mean are the overt acts. I would send that in, rather than read them. Let us get that resolved.

Marshal, ask the jury -- and I will wait for your answer -- when they say "copies of charges" do they mean the overt acts that I referred to when I charged them? Ask them if they mean a copy of the overt acts that I referred to in the course of my charge, will you, please?

MR. AMOROSA: Judge, with respect to the exhibits, there are many exhibits which your Honor ruled were admitted only to a limited extent, for instance, the Perna agreement, the Vasquez agreement, the Verzino agreement, where we had to delete certain paragraphs because of your Honor's rulings. Because of this, and not only with respect to just those three, Judge, the government is going to suggest that we not send any exhibits to the jury --

THE COURT: I am sorry. All the exhibits go in. If you have to go through some of them, if some have to be retyped, that is just too bad. If you want to cover up certain parts, that is okay with me. The parts that didn't go in, take care of. But don't tell me the jury

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 10007

mmbr 31

should not see the actual exhibits because it is an inconvenience. That is out.

MR. AMOROSA: Can we, therefore, send some in now?

THE COURT: Certainly, and have the clerk take in the others.

Mr. Bowen, you go right about taking them in.

What the jury is entitled to, I am going to see that they get.

Now, what do you say, marshal?

THE MARSHAL: Your Honor, they want the counts in the indictment plus the overt acts.

THE COURT: Give the marshal a clean copy of the indictment. That will take care of their message.

MR. J. PANZER: Does that include the exhibits of the defendants?

THE COURT: I am just sending the indictment in now. I am ruling that all the exhibits are to go into the jury room, and I want you to recite for the record what you are sending in to the jury. You are going to be held accountable for your recital on the record.

No. 2, if there is any exhibit or exhibits which cannot go into the jury room in their entirety, because we ruled that certain portions are not in evidence,

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

then I want those immediately attended to so they can be sent in within a matter of minutes.

Now, you tell me which ones are being sent in and give them to the clerk to send in. That is all there is to it.

MR. AMOROSA: Does your Honor want me to read into the record the ones I am going to send in?

THE COURT: That is a common thing you do every time. Have the record reveal what it is the government is sending in to the jury. And the defense will read into the record what they are sending in.

THE MARSHAL: The jury wants to know if they can have copies of the indictment.

THE COURT: No, just the one.

Get your exhibits together. I will step off the bench for a minute. The jury wants them right now. They are the bosses right now and they get what they want.

(Recess.)

THE COURT: Call off the exhibits.

MR. AMOROSA: The following government exhibits in evidence: 1, 1-A, 2, 2-A, 2-B, 3, 3-A, 3-B, 4-A through 4-C, 6, 6-A, 6-B, 7, 7-A, Government's Exhibit 8, with the exception of paragraphs 1, 7 and 8, which will be taken out by your clerk, 9, 9-A, 10-A through 10-K -- 11 will not be

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. 10007

mmbr 33

submitted to the jury, as it is heroin --

THE COURT: I already told him the heroin and the money would be available if they insisted on it. That is it.

MR. AMOROSA: Did you say the heroin would be available for the jury?

THE COURT: If they wanted to see it, sure. It is an exhibit; you will have to produce it. They have not asked for it. Why do you make an argument about it?

MR. AMOROSA: Government's Exhibits 32, 33, 33-A, 33-B, 35, 35-A, 36, 36-A, 3503-F with the exception of the first, the sixth and the seventh paragraphs, 37, 37-A, 38, 38-A, 39-A through C, 40, 41, 42, 42-A, 43-A through E, 45, 46, 77, a tape of the Perna conversation with Condella, your Honor, which is here, and the jury would not be able to make use of it, unless it was on the recorder.

THE COURT: Do you have a transcript?

MR. AMOROSA: There is a transcript which was just admitted as an aid to the jury.

THE COURT: So there is no harm in that, is there? Why can't that go in?

MR. AMOROSA: We have no objection.

THE COURT: Well, send in the tape and send in the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

mmbr 34

transcript, and if they want the tape played, why, you just set up the machine. That is all. The jury is entltled to the exhibits. Don't quarrel with them. They want them; let them do what they want. If they want the heroin, deliver the heroin to them with 15 guards. They are entitled to pick it up and look at it. If they want the money,let them look at it. It is an exhibit.

MR. AMOROSA: Government's Exhibit 69 is the transcript of the conversation between Perna and Condella.

THE COURT: The chances are they won't want to be bothered with any of it. They have already been told the heroin and the money is in the vault, or wherever I said, and in all likelihood they would have no interest in sending for it. But you have to let the jury have whatever they are entitled to. They have to resolve the guilt or innocence of these people. They have to look at these exhibits, not at you and not at me.

MR. AMOROSA: Government's Exhibit 86, which is also Soldano's Exhibit C in evidence, Government's Exhibit 106, 107 and 108, 112 and 110.

THE COURT: Does the government represent now that it has mentioned each and every exhibit that was received in evidence on behalf of the government?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

mmbr 35

MR. AMOROSA: Yes, we have, sir.

THE COURT: Very well. Turn it over to the marshal. Marshal, will you take it, please?

MR. AMOROSA: There are some additional defense exhibits.

THE COURT: In the meantime, we have already wasted too much time. They sent this note in almost three-quarters of an hour ago. In most cases the lawyers get together, they pile up the exhibits, and in ten minutes the whole business is in the jury's hands.

Let us get going. Give them to the marshal. Let him, at least, take that much in.

Mr. Edward Panzer, the Court designates you as the one to collect all the exhibits on behalf of the defense. Are you ready to do that or do you want a little more time?

MR. E. PANZER: I am ready. Magnano's Exhibit K, Magnano's Exhibit J, Magnano's Exhibit G, Pallatta's H, Pallatta's C, Pallatta's G, Pallatta's B; DeLutro's C, Soldano's D and Soldano's C. Those are all the defense exhibits.

THE COURT: Thank you. Do you represent, Mr. Edward Panzer, so far as you know those are all the exhibits on behalf of all the defendants?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

MR. E. PANZER: Yes.

THE COURT: Marshal, will you take those into the jury room, please. Turn them right over to the marshal, will you, Mr. Panzer?

That takes care of that.

Mr. Clerk, will you take the jury's note.

(Jury note marked Court's Exhibit 6 for identification.)

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(At 10:55 the jury took its place in the jury box.)

THE COURT: Madam Forelady and members of the jury. Application granted. You would like to adjourn at 11 p.m. and begin tomorrow at 10 a.m.. I was about to send for you when your note came. You have had a full day. Go home and have a good night's rest. Come back tomorrow morning at 10.

Always remember -- I have seen these things more than you; I have lived a long time and seen how people behave -- watch yourselves. The case is now in your hands. Someone might be tempted to talk to you, to telephone you, to bother you. You let me know immediately. I don't think there's a chance of it happening, but it has happened in the past. The law has a way of meeting. I hope I have shown you that the Judge is not afraid to act. If someone

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. - 791-1020

mmbr 37

does something not proper, I will move right on in. That is the only thing I can say of myself. I have done it. I will continue to do it until my last days. Nobody is going to bother you. As I said, the chances of it happening are very small. I want you to know that you are to be on your guard. Don't let anybody bother you. Go right to your room in the morning. Nobody has a right in there, not even the marshal. He knows his place. When you want him, you knock on the door. He is not entitled to be in that room.; that is the inner sanctum; That is yours. I can't go in there; No one else can go in there where you preside. We understand each other. Thank you. Good night.

(Jury excused.)

MR. AMOROSA: Do we have your Honor's permission to retrieve the exhibits and bring them back tomorrow after the jury leaves?

THE COURT: You are absolutely right.

Marshal, go right in now, get all the exhibits and bring them back here in my presence.

THE MARSHAL: Yes, sir.

(The marshal complies.)

THE COURT: Thank you, Marshal. Look them over quickly and tell me whether you have got everything.

MR. AMOROSA: Yes, everything appears to be here,

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your Honor.

MR. E. PANZER: Everything appears to be here.

THE COURT: Good night, gentlemen.

(Whereuon, an adjournment was taken to October 23, 1975, at 10 o'clock a.m.)

:5 pm
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A 130

REQUEST NO. 1

Testimony of an Accomplice

"An accomplice's testimony is to be received with caution and care and weighed with caution and care. Experience has shown that accomplices may be motivated to place the responsibilities on others than themselves. Accordingly, an accomplice's testimony should be closely examined, weighed with care, and against the evidence which may or may not corroborate them, and then you should give the testimony such value or weight as you deem important under the circumstances. An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will initiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony. You may not convict on unsupported accomplice testimony unless you believe that testimony, like other witnesses, beyond a reasonable doubt.

United States v. Projansky, 465 F.2d, 123, 136 (2d Cir.1972)

United States v. Phillips, 426 F.2d 1069, 1071, (2d Cir.1970)

United States v. Padgent, 432 F.2d 701, 704 (2d Cir. 1970)

REQUEST NO. 2

INFERENCES FROM FALSE TESTIMONY

In considering the evidence in this case you must consider the carriage, behavior, bearing, manner and appearance of a witness. The words used by a witness are by no means all that we are to rely on in making up our minds about the truth of the matter before us. The Jury may and indeed should take into consideration the whole nexus of sense impressions which they get from a witness. Moreover such evidence as the bearing and manner of a witness may well satisfy you not only that the witness testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance as to give assurance that the witness is fabricating and that if he is, there is no alternative but to assume the truth of what he denies.

Thus you may find, based upon the demeanor of the witnesses PERNA VERZINO and VASQUEZ, that their stories are fabrications and that the opposite of what they say is the truth.

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952)

United States v. Jenkins, 510 F.2d 495, 499 (2d Cir. 1975)

A. REASONABLE DOUBT, PRESUMPTION OF INNOCENCE, ETC.

2. A reasonable doubt is a doubt which would cause one to hesitate to act. Holland v United States, 348 U.S. 121, 140; United States v Bilotti, 380 F2d 645, 649 (1967).

C. ACCOMPLICE TESTIMONY

10. An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony. United States v Padgent, 432 F2d 701, 704 (2nd Cir., 1970).

11. The testimony of an accomplice is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of accomplices unless you believe that unsupported testimony beyond a reasonable doubt. Devitt & Blackmar, Federal Jury Practice & Instructions, Section 12.04.

USA:DS
4-696

REQUEST NO. 3-a

Reasonable Doubt

Now, what is meant by the expression "beyond a reasonable doubt?" The words almost define themselves. It is a doubt based on reason, which arises from the evidence or lack of evidence in the case. It is a doubt which a reasonable person has after carefully weighing all the evidence. It is a doubt that appeals to your reason, to your judgment, your common understanding and your common sense -- such as would cause you to hesitate to act in matters of importance in your daily lives. But it is not caprice or whim or speculation. It is not an imagined doubt or a fanciful one. It is not a doubt that a juror might conjure up to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Let me respect, it is a reasonable doubt.

It is not necessary for the Government to establish the guilt of the defendant to a positive certainty or beyond all possible doubt. It that were the rule, few people, however guilty they might be, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which, by its nature, is not susceptible of mathematical certainty. In consequence, the law is such that in a criminal case it is enough if proof that a defendant is guilty be established beyond a reasonable doubt, not beyond all possible doubt.

D. in Rubenstein 3605

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M-698

REQUEST NO. 4 & 27

Interest of Defendant (If Applicable

The law permits, but does not require a defendant to take the stand in his own behalf. In this case, the defendant took the stand. Obviously, he has a deep personal interest in the result of this prosecution. Indeed, it is fair to say that a defendant has the greatest stake in the outcome of the trial. Interest, as you know, creates a motive for falsely testifying. The greater the interest, the stronger the motive, and a defendant's interest in the result of a trial is of a character possessed by no other witness.

In appraising a defendant's credibility, take his interest in the outcome into consideration. However, it by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful, and straightforward story. It is for you to decide to what extent, if any at all, his interest has colored his testimony.

Adapted from the charge of Judge Murphy in United States v. Goldberg, (2d Cir. Docket No. 31432), Government's appendix at p. 336a;

See also Regan v. United States, 157 F.2d 801 (2nd Cir. 1955);

BEST COPY AVAILABLE

DATED: New York, New York
November 25, 1975

YOURS, ETC.,

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Attn: Dominic F. Amorosa, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

- against -

JOSEPH MAGNANO, et al.,

Defendants.

NOTICE OF MOTION FOR A NEW TRIAL

75 CR 687 (IBC)

----------X

PLEASE TAKE NOTICE that upon the annexed affidavit of GILBERT EPSTEIN, ESQ., and the accompanying exhibits, the defendants RICHARD BOLLELLA, FRANK PALATTA and JOSEPH MAGNANO by and through their respective counsels, GILBERT EPSTEIN, ESQ., JAY GOLDBERG, ESQ., and EDWARD PANZER, ESQ., will move before the Honorable Irving Ben Cooper, U.S.D.J., in the United States Courthouse at Foley Square, City and County of New York on Wednesday, December 3, 1975 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for the following relief:

I. An order granting to the defendants RICHARD BOLELLA, FRANK PALATTA and JOSEPH MAGNANO, an evidentiary hearing to determine if a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure should be granted.

II. An order granting to the defendant RICHARD BOLELLA a judgment of acquittal on Counts Two and Three of the Indictment pursuant to the prohibition against being placed twice in jeopardy for the same offense as set forth in the Fifth Amendment to the federal Constitution and Rule 29(c) of the Federal Rules of Criminal Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

- against -

JOSEPH MAGNANO, et al.,

Defendants.

AFFIDAVIT

----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

GILBERT EPSTEIN, being duly sworn, deposes and says:

1) I am an attorney admitted to practice before the United States District Court for the Southern District of New York with offices at 100 Church Street, City and County of New York. I am making this affidavit in support of the various forms of relief sought by the defendants RICHARD BOLELLA, FRANK PALATTA and JOSEPH MAGNANO.

2) All statements contained herein are based on information and belief unless otherwise stated.

3) In a letter dated November 11, 1975 (Exhibit 1), Assistant United States Attorney Dominic F. Amorosa turned over to the defense copies of three (3) interviews (Exhibits 2, 3 and 4) of Government witness Mario Perna concerning the facts and circumstances of his escape from the Federal Detention Center at 427 West Street, New York, New York. These interviews were conducted in October, 1974, and were not made available to the defense during the trial for the above mentioned case, pursuant to 18 U.S.C. 3500.

4) In the course of this direct examination of

Mario Perna, the prosecutor elicited from this witness that in August, 1974, Perna was told by his counsel at that time that Anthony Verzino was cooperating with federal authorities and that this was the reason he planned his successful escape from the Federal Detention Center, which occurred on September 22, 1974. (Exhibit 5).

5) In an interview with F.B.I. agents on October 11, 1974, Perna stated that he began to plan his escape from the Federal Detention Center some four and a half months prior to September 22nd, or in early May, 1974 (Exhibit 2).

6) On cross-examination (Exhibit 6) Perna testified that he had been cooperating with the Government at least since June, 1975, and had been telling the truth to the Government at all times. The Government as part of it's case-in-chief sought to introduce, and did in fact introduce, a post-arrest statement of February 1, 1974, by Mario Perna in which he implicated several of the defendants on trial as either customers or suppliers of heroin. The Government attached great weight to this statement by Perna, utilizing it as a prior consistent statement, and stating at page 1270 of the record, "This is a crucial point. It will establish the guilt of these defendants beyond all doubt." The Court recognized that even though the defendant BOLELLA as well as several other defendants on trial were not mentioned in the statement, the statement itself would have an effect on <u>each</u> defendant (Exhibits 7 & 8).

7) The witness Perna was cross-examined by numerous defense counsel over the course of several days and not on a single occasion did any one of them establish that this wit-

ness had ever given a version of his testimony to any federal agent or prosecutor that was inconsistent with his subsequent recitations of that same testimony. The Government was thus able to establish that Perna's story had always been the same even prior to the arrest of Verzino.

8) The interview that Mario Perna had with agents of the F.B.I. on October 22, 1974 (Exhibit 3), however, indicates clearly that Perna had lied to the agents on two earlier occasions when they had interviewed him.

On October 22, 1974, Perna stated, "I am making this statement at this time to disclose the involvement of members of my family, friends, associates, and a member of the clergy, which I previously had desired to protect.

"My earlier statement concerning obtaining and using a brass plate taken from a stair at the Federal House of Detention was fictitious. Furthermore, I did not make the second and third door keys from impressions supplied by Correction Officer Giannino. As I indicated earlier in this statement I fabricated information concerning the brass plate and the fact that I made the second and third door keys in an effort to misdirect the investigation so as to avoid implication of the people I referred to above."

9) This statement by Perna on October 22nd, totally undercuts the Government's position that Perna was open and honest on those occasions when he did agree to speak with Government agents prior to Verzino's arrest. The Government stated to the Court:

"If Perna was telling the Government that prior to

the time of Verzino's arrest what he is telling the Jury now, there could have been no fabrication between Verzino and Perna after Verzino's arrest because Perna had already told the same story prior to the time of Verzino's arrest". (Exhibit 7)

10) The statements that Mario Perna gave to the F.B.I. agents in October 1974, clearly establish that Perna did fabricate a story when speaking with Government agents, that he did withhold the identities of individuals known to him to be involved in that criminal enterprise, and that he did attempt to misdirect the Government's investigation. It also establishes that Perna lied about the role and activities of other individuals he implicated in the escape from West Street on September 22, 1974.

While defense counsel sought to convey to the jury that Perna was implicating the wrong people, and was seeking to misdirect the Government's investigations by withholding the identities of his true suppliers, there was no direct evidence in the trial to sustain this position. Now for the first time, after the trial, the Government has provided direct evidence out of the mouth of the witness Perna which shows beyond all doubt that this witness on other occasions has concealed facts from the Government in order to mislead the prosecution and to conceal the identities of various criminal actors.

11) These statements of Mario Perna's (Exhibits 2, 3 and 4) have been in existence and in the possession of the United States Government since October 1974. The statement of October 22, 1974 (Exhibit 3) bears a partly obliterated exhibit tag indicating that this document has been utilized in the past

by members of the staff of the United States Attorney's office in matters that are either pending before the United States District Court in the Southern District of New York or before the Grand Jury. Significance of these documents is evident on their face and it is obvious that the Government had these documents and knew of their existence prior to September 22nd, 1975.

The Supreme Court has said:

"The prosecutor's office is an entity and as such it is the spokesman for the Government . . . to the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it. . ." Giglio v. United States, 405 U.S. 150, 154 (1972).

See also: Santobello v. New York, 404 U.S. 257, 262 (1971).

12) The discovery of the interviews of Mario Perna conducted in October 1974, by F.B.I. agents within two weeks of the Jury's verdict is clear proof, absent any reasonable explanation by the Government, that the Government had possession of these documents during the trial itself. United States v. Consolidated Laundries Corporation, 291 F2d 563, 569 (2d Cir. 1961); Kyle v. United States, 297 F2d 507, 511 (2d Cir. 1961).

13) In view of the use to which the Government has put these documents in the past, utilizing at least some of them as exhibits either before the Court or Grand Jury, the failure to turn them over entitles the defendants to a new trial.

The Court of Appeals in United States v. Morell, Dkt. No. 74-1827, 5873, 5880 (August 29th, 1975, 2d Cir), stated that the failure to produce records that was deliberate or the result of gross negligence on the part of the government would entitle the defendants to a new trial.

Where the Government fails to abide by the Mandates of Congress, regardless of the possible impact the item may have had upon a jury, the withholding of the item requires a new trial. See Kotteakos v. United States, 328 U.S. 750, 764, 765 (1946).

14) Courts should not speculate as to what material may be effectively utilized for impeachment. In Rosenberg v. United States, 360 U.S. 367, 371 (1959), the Court held that the failure to turn over to defense counsel two letters which should have been produced was 'harmless error' where defense counsel was already in possession of the material contained therein, but Mr. Justice Frankfurter went on to state:

"An Appellate Court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled."

Our own Court of Appeals in United States v. Consolidated Laundries Corporation, supra at 570 adopted this position in stating:

"Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

In Napue v. Illinois, 360 U.S. 264, 269-270 (1959), the Court in reversing a conviction where the prosecutor allowed a witness to testify to a falsehood which he knew to be false

but which he allowed to stand uncorrected, stated through Mr. Chief Justice Warren:

"The Jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the District Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for it's impact was the same, preventing as it did, a trial that could in any real sense be termed fair."

15) In the instant proceeding the case against the defendant Bolella rested entirely upon the testimony of Mario Perna and Anthony Verzino. There was no documentary cooroboration as to the case against Bolella, nor did he make any post-arrest statements. There was no testimony by any member of any law enforcement agency that he even saw Bolella during the period covered by the indictment. There was no other accomplice testimony against Bolella. There was no narcotics or money seized from him and no tape recordings of any conversations. The case as to Bolella rested on Perna and Verzino.

The only independent link between the testimony of Perna and Verzino was the prior consistent statement by Perna

on February 1st, 1974 before Verzino's arrest on February 25th, 1974. Thus, as the Government stated, the only explanation for the parallel stories of Perna and Verzino was the fact that they were telling the truth as witnessed by Perna's prior consistent statement.

The Government was aware from the opening remarks of the various defense counsel that the defense was endeavoring to prove that the Government had been "sold a bill of goods" by the two chief witnesses, Perna and Verzino. The defense opened to the jury on the theory that Perna and Verzino were implicating innocent people and were withholding the identity of their true sources of heroin. The high value to the defense of these documents could not have been overlooked by the prosecution as they clearly support the defense claims that Perna sought to conceal the identity of some and exaggerate the roles of others. All in an attempt to mislead the Government. It is clear that the defense was thwarted in its design by the withholding by the Government of documents to which they were entitled by law.

WHEREFORE, it is respectfully requested that this Court hold an evidentiary hearing to determine if an order for a new trial for the defendants Richard Bolella, Frank Palatta and Joseph Magnano based upon newly discovered evidence should issue.

II

1) After the jury had rendered partial verdicts as to several defendants on various counts the court on its own initiative and without consulting counsel for either side, began to thank the jury for their service. Upon the conclusion

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

#2.5

Place N.Y. N.Y.
Date Oct. 11, 1974
Time 8:05 pm

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: Edward J. Holden SA, FBI, NY NY 10/11/74

Witness: Edward A. Parker Special Agent FBI - 10/11/74

Time: 8:09 pm

the above F.B.I. agents were properly identified to me and I advised to talk about my case from desk of [illegible] in dept. 23.74

STATEMENT

I, Mario Anthony Perna, make the following statement freely and voluntarily. I am 45 years of age, my date of birth is May 6, 1929, and I was born in New York City. I escaped from the Federal House of Detention in New York City on Sept. 23, 1974 shortly after the termination of approximately

M.P.

12:40 or 12:45 pm.

The facts surrounding the escape are as follows: About 4 1/2 months prior to Sept. 22 I removed a strip of brass about 30-36 inches long and 3 inches wide from the top step of the stairs leading from the second to the third floor, also described as the inner staircase. I cannot specifically recall if the brass strip came from that staircase step but if you check at the jail you will find a brass strip missing from the top step of one of the staircases. The reason I cannot specifically recall the staircase is due to the fact that I tried to remove more than one before being successful. It was necessary to remove more than two screws to free the brass strip.

I then obtained a file from the boiler room and also cut the brass strip into pieces about 4 1/2 inches in length by 7/8 inches and hid them in several different places. Most of the time I carried a few of the pieces on my person.

By using dampened bread dough which I pushed against the first door I was able to get an impression of the lock opening and

M. P.

thus the measurements of the lock were obtained. I then began to fashion a homemade key by filing down one of the cut brass strips and cutting the channels into the brass, that is, the side channels. The only tool I used was the file mentioned above. I then found it necessary to closely observe the actual institution cell key as it hung from the key ring while on the belt of various correction officers in order to determine how I was going to duplicate or imitate the teeth of the cell key. I filed a little at a time and two to four times a day I tried the key in the lock of the sallyport door which is the first door I would have to open for the escape. Following a period of trial and error lasting 5-6 weeks I had finished the key and it opened the sallyport or first door. The color of my homemade key was close to the color of the institution key and the dimensions of the finished product were about 4 to 4 1/2 inches long, 7/8 of an inch thick. It contained 4 teeth and the teeth were 1/16 of an inch apart. I will make a drawing or sketch of the key I made.

I attempted to repeat my effort for the second or inner sallyport door and made

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M.I.F.

similar impressions of the outer portion of the lock, not the tumblers, using tongue depressors and a piece of cheese. I was successful in getting partial impressions of the tumblers and was therefore successful in creating a partial key containing the side grooves and some teeth but my efforts were hampered by the fact that I was not able to get a glimpse of a close look at the the second or inner sallyport key due to the fact that those keys do not normally enter the institution. The second key and the warehouse key usually remain outside the institution in the hands of correction officers working in the trash and warehouse areas.

I was therefore unable to make the second key since I could not accurately copy the teeth but I was determined to keep trying.

About 7-8 weeks prior to Sept. 22, 1974, a Correction Officer by the name Giannino, who was working on the third floor, was approached by Nelson Garcia, one of the escapees, and while making general conversation he joked with Giannino about "how much money would it take to open the doors" and Giannino replied that it would take $200,000. Giannino had been on

friendly speaking terms with Garcia and had been bringing in cold cuts to Garcia. Garcia then approached me and stated that he had the above conversation with Giannino and was wondering whether he should approach Giannino in a serious way concerning Giannino's assistance in effecting an escape. I told him that I do not know Giannino and therefore could not trust him but I also said that if he felt confident about speaking to him to go ahead and try. At this time Garcia did not know I had made the first key. Harry Lupps, Ficconi and no other person was aware I had made the key to the first door.

I think Garcia decided not to approach Giannino because Giannino was not in the right position to help us. However, about 6 weeks prior to Sept. 22, Giannino was transfered to duty in the control room on the first floor and began working 4pm - midnight which was the same shift he was working on the third floor.

Immediately after Giannino began duty in the control room Garcia approached him and asked him "wit would you want to get us the keys to the sallyport" or words to that effect and

also included the warehouse door. Giannino said he wanted $5,000 for the three key impressions necessary for the escape; Giannino said he wanted $5,000 for an impression of the second or inner sallyport door key and the rest upon delivery of the other two impressions. Giannino had previously mentioned financial difficulty at home. Garcia came to me and told me Giannino is willing to give us the impressions so I cut several strips off a styrofoam cup, white in color, and gave them to Garcia with instructions to give them to Giannino and instruct Giannino to press the key to the second door into the styrofoam thus leaving an impression. Giannino was given the styrofoam by Garcia and the next day or the same night Garcia gave me back two strips of styrofoam bearing the impressions of both sides of the key to the second door. The reason Giannino started with the second door was because the first door was to be his security, that is, he decided to give Garcia the first door key impression last because he would then be sure to get his money. Giannino was asked to "start us off with the second or middle door" and then the warehouse and then the first door. Giannino

W.P.

made no bones about it and gave it to us in the order we wanted them.

The next day, or day after that, $1500 was placed in the trunk of Giannino's car, a blue Monte Carlo, not a new car but at least a couple of years old. Giannino had given Garcia a key to the trunk of his car for the purpose outlined above. Garcia gave the key to someone he knows who handled the money payoff and as far as I know the trunk key never was returned to Giannino. I do not know where Giannino's car was parked the night the money was placed in the car trunk but I do know it was close to the jail. I saw the trunk key and it was silver in color but worn, revealing yellowish spots of tarnish.

Giannino asked Garcia for the other $3500 and was promised by Garcia that he would get it. Giannino said he trusted Garcia as a man and felt secure and confident that he would get his money, all his money. Within 7-10 days Giannino turned over to Garcia the impressions, in st profoam, of the warehouse key in the same manner as with the second door. The day following the receipt of the impression of the warehouse key I told Garcia that he would

W.P. 3

M. P.

have to go back to Giannino and get him to make a tracing of the warehouse key and make notations about the dimensions of the key. The reasons I needed the tracing and dimensions was because even though I had filed down another piece of the brass strip referred to on page 2 and had made a key which fit perfectly into the styrofoam impression the key to the warehouse did not work. The key that I made from the impressions of the second door worked and therefor it was not necessary to have a tracing of that key. So Giannino made the tracing of the warehouse key on a 4 x 5 piece of paper the color of which I cannot recall and made notations similar to those I made on the sketch of the first key.

After receiving the tracing of the warehouse key I filed down my homemade key a little more and tried it in the door while working in the first floor sanitation area where I was assigned work. I was finally able to get the key to work in the warehouse lock and Harry Kuppes also tried it and it worked for him also.

We kept telling Giannino that the keys we were trying to make were not working while actually

M. P.

M. P.

the keys made by me from impressions of the second warehouse door were sufficient and opened the doors. By telling Giannino that they had not been successful Giannino did not pressure Garcia for more money.

After receiving the impression for the warehouse door Garcia told Giannino that they wanted to wait a while for impressions of the first door but actually, at this point, 2-3 weeks prior to Sept. 22, 1974 all three keys were completed and worked. Giannino was never told that the keys worked in the locks.

Barrera, Lopez, Ficcaro, Bornstein, Lappen and Garcia all had knowledge of the keys, and that they were being made, in addition to myself. Three or four days prior to Sept. 22 we all sat down and decided to use Sunday, Sept. 22, 1974 because it would be a quiet day and not one would be working in the warehouse. No other inmates knew of our plans.

I want to also mention that around the time of the escape Giannino was having physical problems with his leg and had been admitted to the hospital for a day or two and then came back to work. Giannino then had to take more

M. P.

third PI from work because of a leg problem which causes him to walk with a limp. Giannino is in his middle twenties, 5'9", 160-165 lbs. black hair, no eye glasses, clean shaven. Gianni also told [redacted] that someone in Giannino's family, possibly his mother in law, was injured in an auto accident.

On Sept. 22, 1974, starting about 9:00 a.m. I made several attempts to open the first door with my homemade key but it wouldn't open probably due to nervousness on my part. I tried unsuccessfully for about one hour. The agent I was then went up stairs to the third floor after the population had been fed we returned to the first floor area at about 12:30 pm and after one more unsuccessful attempt at about 12:30 pm I tried again at 12:40 or 12:45 pm and the door opened. I had stationed some of the seven escapees around the area to be sure no guards were nearby and when I successfully opened the first door the other six men followed me. To my knowledge no other inmates witnessed the above. I don't remember who had the key to the second door but the key successfully opened that door on the first try. I thought the second door was locked behind

M.P.

we beat I am not sure. The third door was opened by one of us, I can not remember which one, and we were then in the warehouse.

I recall that about 12 noon, prior to the escape, I heard inmate Simmons being paged and instructed to report to the print shop and because I knew he was a computer operator in the warehouse I interpreted that to mean that someone must be working in the warehouse area. But since we had already made up our minds to go we were determined to escape regardless of the fact that someone was working in the warehouse. I figured Simmons and the other person upstairs in the business office over the warehouse might stop the electronic overhead door open but I decided to take a chance.

When we got into the warehouse we walked over to the electronic door, I pushed the button and actually pushed the down button as the door was going up but it did not stop or come back down. We ran up the street where I had a car waiting for me and the other six were picked up by a truck with a 14 foot body, painted silver. I had arranged to have the car left for me with the keys left in the ash tray and a change of

M. P.

I clothes. I immediately drove over the Queensboro Bridge and to Northern Blvd. As I drove east on Northern Blvd I threw my prison pants, with the key to the front door in the pocket, out the window but over the top. I do not recall the exact lot on the right side of the street. The location was 3-4 blocks past the elevated railway.

I want to add that the other two keys I made were left in the possession of the other escapees. The keys were similar in color to the institution keys.

M. P.

I have read the above statement consisting of two pages and three lines and declare them and each of them to be true and correct to the best of my knowledge and belief.

Witnesses:

Edward L Breen Special Agent FBI - 10/11/74
Edward J. Holiday, Special Agent, FBI, NY NY 10/11/74

No. 1914

Exhibit A

This sketch was drawn by me 10/11/74 of the log I made on the 2nd log from the



Walter Jones

A15

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place N.Y. N.Y.
Date Oct 13, 1974
Time 3:05 pm

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: Edward J. Sullivan, SA, FBI, NYNY 10/13/74

Witness: Thomas F. Walther, SA, FBI, NY, NY 10/13/74

Time. 3:12 pm

STATEMENT

"I, Mario Anthony Perna, have been made aware of the identity of the FBI Agents whose names appear as witnesses on this page and of the nature of questions they desire to ask me which relates to my escape from the Federal House of Detention in New York City on September 22, 1974, and prior events connected to that escape.

M.P. M.P.

M.P. "I make the following statement freely and voluntarily, and this statement is to be an addition and further clarification of a statement I made to SA Edward Holiday on the evening of October 11, 1974. M.P.

"Concerning Correction Officer Giannino, who aided me and the other six escapees, I want to say that an inmate at the Federal House of Detention by the name of John De Benidictus, also had had conversations with Giannino during the four months prior to the escape and was actually the person who informed Nelson Garcia that he thought Giannino could be approached seriously concerning an escape attempt. De Benidictus had been on friendly terms with Giannino, and Giannino had been bringing food into the jail at De Benidictus' request. De Benidictus then arranged a meeting between Giannino and Nelson Garcia, at which time a friendly and not serious conversation took place, at which time Garcia jokingly asked Giannino what it would take to get Giannino to open the doors, to which Giannino replied '$200,000'.

'A short time following that conversation, Giannino was transferred to the Control Room, and De Benidictus then arranged a subsequent meeting between Garcia and Giannino, which took place in De Benidictus' presence, and it was at this meeting that the terms regarding money to be paid to Giannino, and which appear in my earlier statement, were discussed and finalized.

"Subsequent meetings between Giannino and Garcia all were held in De Benidictus' presence, and those meetings, as my earlier statement reads, also related to obtaining impressions of the second and third doors, which we would have to go through to escape. De Benidictus obviously had full knowledge of all negotiations between Garcia and Giannino and was aware that I had completed construction of the second door key made from an impression supplied by Giannino. De Benidictus was not aware that I had successfully constructed a key which opened the first door which was made, as I earlier stated, prior to the first negotiation with Giannino regarding impressions.

"Approximately four to five days before the escape, De Benidictus was made aware of the existence of the first door key but was never told about the third door key because I did not trust him and felt that he might be setting us up. De Benidictus told

M.P. M.P.

A 160

M.P.
Garcia that he wanted to escape with us, and he also M.P.
discussed that fact with me, but I put him off because
I did not trust him. A few days prior to the escape
we let De Benidictus know that we had tentative plans
to escape on September 23 or September 24, and I also
told him that I would probably have the third key made
by them. Actually, I already had it made.

"On the day of the escape, I did not tell
De Benidictus of our escape plans nor did any of the
other escapees because, as I said before, we did not
trust him.

"The reason I did not mention De Benidictus'
name before now was due to the fact that I assumed he
had already given the FBI information about his knowledge
of the escape and the escape plans involving Giannino."

I have read the above statement consisting
of this page and two others and declare
that they are true and factual to the
best of my knowledge.

Mario Puma

Edward J. Halliday, SA, FBI, NYNY 10/13/74
Leno T. Walker, SA, FBI, Jy. Cty 10/13/74

-3-

A161

ERROGATION; ADVICE OF RIGHTS

EXh

YOUR RIGHTS

Place N.Y. N.Y.
Date 10/22/74
Time 8:15 AM

; ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: Edward J. Holiday SA, FBI, NYNY 10/22/74

Witness: Robt F. Kaminsky, SA, FBI, NY, NY 10/22/74

Time: 8:16 AM

STATEMENT

MP

MP "I, Mario Anthony Perna, have been made aware of the identity of Special Agents Edward J. Holiday and Robert F. Kaminsky, whose names appear as witnesses on this page, and of the nature of questions they desire to ask me which relate to my escape from the Federal House of Detention in New York City on September 22, 1974, and prior events connected to that escape.

MP

MP

"I make the following statement freely and voluntarily and wish to make clear at this time that this statement is being made by me to further clarify and add to statements made by me on October 11, 1974, and October 13, 1974. Further, I am making this statement at this time to disclose the involvement of members of my family, friends, associates, and a member of the clergy, which I previously had desired to protect.

"My earlier statement concerning obtaining and using a brass plate taken from a stair at the Federal House of Detention was fictitious. Furthermore, I did not make the second and third door keys from impressions supplied by Correction Officer Giannino. As I indicated earlier in this statement I fabricated information concerning the brass plate and the fact that I made the second and third door keys in an effort to misdirect the investigation so as to avoid implication of the people I referred to above.

"In June or July of 1974, while an inmate at the Federal House of Detention in New York City, I did make the first key to the first of three doors necessary to negotiate for a successful escape; however, the key I made did not work and I discarded it. That first attempt was made by using a scrap piece of brass supplied to me by inmate Fiocconi, who later escaped with me. I then made another attempt at the first door key by using a file to gouge channels into a piece of metal. No guard aided me in my attempt to duplicate the first door key and I merely closely observed that key on the keyring hanging from the guard's belt, over a long period of time. After starting construction of this key, inmates Luppes and Fiocconi asked me to attempt to line somebody up namely a locksmith, to assist us. At about this time I was visited by my brother, Pasquale Perna, whose nickname is Patty, age 50 or 51, who resides at 5 First Street, Harrison, New York, and during my visit with my brother we discussed having a key made. My brother said he thought he knew someone who might be able to make a key. A short time later I was visited by my girlfriend, Yvonne Cruz, and during that visit, which was a contact visit, I gave her a drawing which included dimensions of the first door key, which I obtained only through visual observation of that key, and by using tongue depressors, cheese and bread dough to obtain dimensions. Yvonne gave the drawing to my brother, Pasquale, and he in turn contacted a locksmith, who I do not know but who is known to my brother and to Yvonne. I do know that the locksmith is an elderly man, retired, who resides in Harrison, New York or New Rochelle, New York.

"My brother contacted the locksmith and for a fee of $50 the locksmith made a key from the drawing I had given to Yvonne. The locksmith took approximately one day to make the key. My brother then gave the finished key to my wife, Crucita, and she put it in a large greeting card approximately eight inches by eleven inches in size, which was then placed in an envelope and joined by approximately one dozen additional similar greeting cards in envelopes, which were all then placed in a large manila envelope. My wife then brought that package containing the key to the office of a Catholic priest, known to me as "Father John," whose office is in lower Manhattan. Father John is a regular visitor to the Federal House of Detention and is between 50 and 60 years old, approximately 5'5", medium build, grayish black hair, balding. He wears glasses. My wife, upon delivering the package to Father John, asked him to deliver it to me in jail and he did so, leaving the package on my bunk. It is entirely possible that Father John did not have any knowledge of the key.

"At the earliest opportunity I tried the key in the first door and it did not work. I then realized that the dimensions that I had given to Yvonne had been wrong. I had mistakenly thought that the dimensions of the teeth of the key were one-eighth of an inch whereas they were actually one-sixteenth of an inch.

"Through trial and error and the use of an additional scrap of brass supplied to me by Fiocconi I then made a key to the first door that worked.

"Attempts by me to duplicate the second and third door keys were unsuccessful, as I had mentioned in my earlier statements.

"After Correction Officer Giannino was successfully approached by inmate DeBenidictus and inmate Nelson Garcia, he supplied an impression in styrofoam of the second door key approximately six weeks prior to the escape. I received the impression, wrapped the impression in blank white paper and placed it in an unfranked envelope, white in color, approximately ten inches long and four inches wide. I then gave that envelope, which I had sealed and which was not addressed, to Father John with instructions for him to give it to my wife who was then in Mt. Sinai Hospital located on Fifth Avenue in Manhattan. This occurred in early August, 1974, to the best of my recollection. Father John gave the unaddressed envelope to my wife in the hospital and my brother Pasquale went to the hospital and picked

He then contacted the locksmith, who charged $100 to make a key from that impression. In approximately one day the key was completed and given back to Pasquale, who in turn gave it to my wife, who then followed the same procedure as I earlier described by placing the key in a large greeting card, which was placed in a larger envelope along with other greeting cards. My wife instructed my brother to bring the cards to Father John's office, which he did, but upon handing that package to Father John, Father John refused to accept it because he felt a hard object that felt like metal. My brother offered Father John money to take the package to me and FatherJohn refused. My brother then took the package back to my wife in the hospital at which time my brother and my wife had an argument concerning me and following that argument my brother either took the package with the key inside, or just the key itself, and gave it to Yvonne.

"As soon as I found out about Father John's refusal and informed Fiacconi and Luppes, we decided we must find another way to get the key inside. Luppes and Fiacconi suggested that the key be given to Giannino to bring in but I refused.

"The day following Father John's refusal, FatherJohn came to the prison and confronted me on the third floor and told me he was very upset that my brother had attempted to give him a package which contained a hard object the night before. Father John told me also that my brother offered him money and then Father John told me to not ask again for him to bring in anything from anybody and also told me that if I wanted anything, he would buy it and bring it in himself. Father John told me that he did not know what was in the package brought to him by my brother and told me that he did not know what my brother was trying to do. He also said that he has prayed that he has not done anything wrong in the past, at which time he referred to the first package containing cards which also contained the key to the first door.

"Following this occurrence, Giannino supplied another impression of the key for the second door with a tracing and dimensions and at the same time supplied impressions for the key to the third door. Prior to this time, $1,500 had been delivered and placed in Giannino's car trunk as I indicated in earlier statements. The $1,500 was delivered by a man known to me as Ponzo, who is a white male, of Italian descent, approximately 5'4", approximately 35 years of age, black hair, stocky build, and who resides in the vicinity of 116th Street and First Avenue in New York City. He works at the Delightful Restaurant, which is located at the corner of 116th Street and First Avenue in New York City. The restaurant is owned by members of Ponzo's family. Ponzo delivered that money following instructions given to him by Harry Luppes, whose true name is Ernest Malizia one of the men who escaped with me. Ponzo is

Malizia's brother-in-law. Ponzo was supplied with the trunk key of Giannino's car by means unknown to me. Malizia took these impressions, wrapped them in blank white paper and placed them in an unfranked white envelope, the dimensions of which were approximately ten inches long by four inches wide. Malizia gave the envelope to Father John with instructions to hold it at his office for his son Richard Malizia, also known as Ricky, to pick up. Richard Malizia lives in Nanuet, New York with his mother, and is approximately 21 years of age, 5'7" or 5'8", slim build, black hair.

"As I mentioned, Ricky was supposed to pick up the envelope containing the impressions at Father John's office but for some reason unknown to me he was unable to do so. My brother Pasquale was unable to pick it up because of hisprior contact with Father John and because Father John had refused the package with the key in it. Yvonne then was instructed by me to go to Father John's office and pick up the envelope containing the impressions, which she did.

"Yvonne then contacted my brother who told her to bring the impressions to the locksmith and gave her instructions how to get to the locksmith's location. She followed his instructions and the key to the third door was made for a price unknown to me. My brother picked the key up from the locksmith and give it to Yvonne. I want to point out that because Giannino had supplied a second impression of the second door key the locksmith made another key for the second door and, therefore, my brother picked up both keys, that is, to the second door and the third door. I also want to point that to the best of my knowledge my brother or Yvonne was holding the second door key made by the locksmith and which was in the package refused by Father John.

"Yvonne gave the two keys plus at least two brass blanks also supplied by the locksmith to Ponzo or Ricky. Prior to giving them to either Ponzo or Ricky, Yvonne wrapped all of the keys together, which now included the key to the second door and which was wrapped in the package that Father John refused, another key to the second door, and a key to the third door, at least two brass blanks and a round and a flat file. Yvonne wrapped all of these items in white adhesive or masking tape and Ponzo put the package in the trunk of Giannino's car.

"I wish to point out at this time that Ricky was supposed to put either the money or the white package containing the keys and files in the trunk of Giannino's car but on the night he was supposed to do that Giannino's car was parked on the corner of 11th Street and West Street, which was in view of the television cameras and, therefore, no attempt was made that night by Ricky. Ponzo, therefore, accomplished both tasks on different dates.

"After viewing three keys which Agent Holiday told me were recovered at the Federal House of Detention during the week of October 14, 1974, I can say with certainty that the longest of the three keys which also has a hole in one end was made by the locksmith and was designed for the second door. That key did not work because the channels were off center and I forced the key into the lock which caused the key to split and, therefore, became useless. Another of the three keys, the one with teeth on both ends, also was made by the locksmith, that is, one end was made by the locksmith and that was designed for the first door but as I mentioned earlier the teeth were one-eighth inches apart and should have been one-sixteenth inches apart. The other end of that key was an attempt by me and Fiocconi to make a key for the second door. The smallest of the three keys showed to me by Agent Holiday was an attempt made by Fiocconi at the third door key, to the best of my recollection, and the metal used was received in the form of a plank supplied by the locksmith.

I have read the above statement consisting of this page and five others and declare that they are true and factual to the best of my knowledge

Mario Ponzo

Edward J. Holiday, SA, FBI, NY NY 10/22/74
Robert F. Kamerick, SA, FBI, NY, NY 10/22/74

A167

M-1159

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : AFFIDAVIT IN OPPOSITION

JOSEPH MAGNANO, :
a/k/a "Joe the Grind" S 75 Cr. 687
et. al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

DOMINIC F. AMOROSA, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Thomas J. Cahill, United States Attorney for the Southern District of New York and am familiar with the facts of this case, having been in charge of the trial prosecution.

2. I make this affidavit in opposition to the post-trial motions of the defendants for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure based on a claim of newly discovered evidence in addition to the defendants' other post-trial motions.

3. Defendants contend that three statements given to representatives of the Federal Bureau of Investigation on October 11, 1974; October 13, 1974; and October 22, 1974; by Government witness Mario Perna entitled them to a new trial based on newly discovered evidence. This claim is frivolous.

4. The above-mentioned statements, Exhibits Two, Three and Four appended to defendant Bolella's motion papers, were furnished to all defendants by letter to the Court dated November 11, 1975. (Bolella's Exhibit One) I became

aware of the existence of these three statements on November 8, 1975, approximately two weeks after the verdict. These three statements were in the possession of another Assistant United States Attorney prior to September 22, 1975, the date upon which trial commenced.

5. The three statements relate to an investigation conducted by the Federal Bureau of Investigation into the escapte of Mario Perna and others from the Federal House of Detention in New York City on September 22, 1974. Mario Perna admitted in his statement of October 22, 1974, that he was making this statement "to disclose the involvement of members of [his] family, friends, associates, and a member of the clergy, which [he] previously had desired to protect" in his previous statements, taken nine and eleven days before. None of these three statements by Mario Perna has anything whatever to do with Perna's narcotics activities or the narcotics activities of his associates about which he testified at trial. They relate entirely to his and other's plan to escape from the Federal House of Detention. To suggest that these three statements require even a hearing under Rule 33 based on newly discovered evidence, let alone a declaration of a new trial, borders on the preposterous.

6. Under the familiar standard governing motions for a new trial on the ground of newly discovered evidence, the defendant has the burden of establishing that the evidence (1) was discovered after trial; (2) could not have been discovered earlier with due diligence; (3) was material to the factual issues at trial and not merely cumulative and impeaching; and (4) of such a character that it would probably produce a different verdict with event of a retrial. United States v. Kahn, 472 F. 2d 272, 287 (2d Cir.), cert.

denied, 411, U. S. 982 (1973); United States v. DeSapio, 456 F. 2d 644, 647 (2d Cir.), cert. denied, 406 U. S. 933 (1972); United States v. Polisi, 416 F. 2d 573, 57677 (2d Cir. 1969); see United States v. Houle, 490 F. 2d 167, 170 (2d Cir. 1973).

In cases involving prosecutorial misconduct, i.e., where the record establishes that the Government intentionally suppressed the evidence or that the high value of the evidence could not have escaped the prosecutor's attention, a new trial is warranted if the evidence is merely material or favorable to the defense. United States v. Kahn, supra, 472 F. 2d at 287 and the case cited therein. Where the newly discovered evidence was in the possession of a responsible Government official at the time of trial but non-disclosure was inadvertent, the test is whether "there was a significant chance that this added item, developed by skilled counsel . . ., could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, 411 F. 2d 825, 832 (2d Cir. 1969); United States v. Sperling, Dkt. No. 732[illegible] (2d Cir., October 10, 1974) slip op. 5637 at 5649; United States v. Kahn, supra, 472 F. 2d at 28788; United States v. Mayersohn, 452 F. 2d 521, 526 (2d Cir. 1971). To suggest that it is likely that Perna's statements would have been likely to change the verdict, or that they were material to the issues in this case, ignores their contents. There is nothing in these statements which even remotely concerns the issues which were presented to the jury regarding the Indictment. They simply reflect Perna's desire over a short period of eleven days to protect his family, friends and a representative of the clergy from implication in a crime which had no relationship to the instant case.

7. The authorities cited by the defendants in support of these motions are totally inapplicable to the issue before the Court and ignore the abundant body of case law in the Second Circuit with respect to motions for newly discovered evidence. In United States v. Slutsky, 514 F. 2d 1222, 1225 (2d Cir. 1975), the Second Circuit repeated the rule with respect to motions directed at newly discovered evidence:

> "Motions for new trials based on newly discovered evidence are not held in great favor, United States v. Catalno, 491 F. 2d 268, 274 (2d Cir.), cert. denied, 419 U. S. 825 (1974). To succeed on such a motion a defendant must show, inter alia, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict. United States v. Costello, 255 F. 2d 876, 879 (2d Cir.) cert. denied, 357 U. S. 937..."

In Slutsky the Court held that the defendants had not even satisfied the first two requirements and, therefore, didn't even consider whether the newly discovered evidence could have produced an acquittal. In United States v. Zane, 507 F. 2d 346, 347 (2d Cir. 1974), the Second Circuit again held that another requirement of the test is that the evidence be "material to the factual issues at the trial and not merely cumulative and impeaching." Nothing is more clear from the Perna statements then that they have nothing to do with the issues at trial and that they could not have altered the verdict.

No plainer proof of this is the fact that it was revealed prior to trial that the witness Anthony Verzino had lied to the Government in late 1974 and early 1975, after he had agreed to cooperate, with respect to a narcotics conspiracy apart from the one charged here. Verzino's lies to the Government with respect to the narcotics involvement

of others were brought to the attention of the Jury at page 3642 of the trial record and were brought to the attention of the Jury at page 3642 of the trial record and were the subject of argument by the defense in summation. If Verzino's post-cooperation misrepresentations to the Government over a period of months in connection with a major heroin conspiracy to import vast amounts of drugs did not have any effect on the jury's determination, it is clear that Perna's misrepresentations over a period of eleven days regarding a subject totally alien to narcotics could have had any effect at all, except to establish cumulative evidence that Perna was not of good character. Perna, having made admissions on the witness stand ranging from conspiracy to murder men and women to perjury to large scale narcotics activities engaged in without remorse, could by no stretch of the imagination be deemed to have been of worse character by revelation of his misrepresentations to protect his wife and friends in connection with his escape.

8. Defendant Bolella's argument that the use of the statements at trial would have established that Perna was lying in February 1974 when, prior to Verzino's arrest, he told representatives of the Drug Enforcement Administration that several of the defendants were his source of supply for heroin is illogical. That Perna misrepresented facts to the FederalBureau of Investigation with respect to the jail break in October 1974 is totally irrelevant to whether he told the truth prior to that time with respect to his narcotics activities. The subject matter of the two investigations had no connection whatsoever.

9. Moreover, the defendants could have discovered these statements during the trial with the exercise of due

diligence. United States v. Costello, supra; United States v. Zane, supra at 347; United States v. Slutsky, supra. They were all aware of Perna's status as a cooperating Government witness and should have been aware that he had given information to the Government in connection with his escape from federal custody. They could have requested any statements which Perna may have given to the Government in connection with his escape. Their failure to do so is supportive of the position that they believed at the time that any statements Perna may have given the Government in connection with his escape were irrelevant to the issues before the jury.

10. Furthermore, the defendants point to no trial testimony by Perna that he told the truth to representatives of the Government from the time of his recapture in October of 1974. As noted in defendant Bolella s motion papers, Perna testified at page 1316 of the record that he had been telling the truth to the Government from June 1975, long after the dates of the statements in question. There was nothing to prevent the defendants from asking Perna on cross-examination whether he had told the truth to all representatives of the Government from the time of his recapture in October of 1974. They elected not to do so for reasons of their own. It is of course presumed that Perna, if asked this question, would have answered truthfully and that the entire matter would have been revealed and the defendants would have discovered what they now complain about.

11. This is not a case in which there has been intentional suppression of evidence favorable to the defense, which would require a more exacting standard in evaluating defendants' claims of newly discovered evidence. Giglio v.

United States, 405 U. S. 150, 153-54 (1972); United States v. Kahn, 472 F. 2d 272, 287 (2d Cir. 1973). The cases cited by the defendants, when even relevant to newly discovered evidence, direct the Court's attention to these cases, which are inapplicable here. But even under this more exacting standard, which would grant a new trial if the evidence were only material, the defendants would still not be entitled to relief as these three statements can at most be said to be cumulative of tremendous evidence of Perna's bad character, which was brought to the jury's attention. Indeed, "the term 'materiality' as used in Brady clearly describes evidence of greater value than that which is merely 'favorable to the accused'". United States v. Pfingst, 490 F. 2d 262, 277 (2d Cir.), cert. denied, 94 S. Ct. 2625 (1974).

The Second Circuit has repeatedly held that, "the discovery of new evidence which merely discredits a Government's witness and does not directly contradict the Government's case ordinarily does not justify the grant of a new trial." United States v. Aguilar, 387 F. 2d 625, 626 (2d Cir. 1967); United States ex rel. Rice v. Vincent, 491 F. 2d 1326, 1329 n. 1 (2d Cir. 1974); United States v. Sposato, 446 F. 2d 779, 781 (2d Cir. 1971); United States ex rel Fein v. Deegan, 410 F. 2d 15, 20 (2d Cir. 1969); United States v. Lombardozzi, 343 F. 2d 127, 128 (2d Cir.), cert. denied, 381 U. S. 938 (1969); United States v. Switzer, 252 F. 2d 139, 145-46 (2d Cir. 1968); United States v. Brewster, 231 F. 2d 213, 216 (2d Cir. 1956); and see Masarosh v. United States, 352 U. S. 1 (1956); Cf. United States v. Trapnell, 495 F. 2d 22, 25-26 (2d Cir. 1974).

As the Supreme Court held in Giglio v. United States, 405 U. S. 150, 154 (1972):

> "We do not, however, automatically, require a new trial whenever 'a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .'" United States v. Keogh, 391 F. 2d 138, 148 (CA 2, 1968).

12. Just as defendants' arguments and authorities are misplaced, their request for a hearing is equally inappropriate. No hearing is necessary in such a motion when, as here, "the moving papers themselves disclose the inadequacies of the defendants' case. . . ." United States v. Slutsky, supra, at 1226; United States v. Johnson, 327 U. S. 106 (1946); United States v. Catalano, supra; see 8A Moore's Federal Practice §33.03[3] (1974 Revision). Moreover, the trial court's decision on such motions is almost inevitably final. "Where newly discovered evidence is sought to place at issue the credibility of a prosecution witness we find it important to give deference to the conclusions of the trial judge whose presence at the proceedings gives him a far better vantage than our own for this determination." United States v. Bermudez, Docket Number 75-1073 (2d Cir. November 6, 1975) slip op. 441, at 459. See also United States v. Zane, 507 F. 2d 346 (2d Cir. 1974), cert. denied, 421 U. S. 910 (1975). In Zane, Judge Wyatt of the United States District Court for the Southern District of New York, denied a motion made on the basis of newly discovered evidence notwithstanding the fact that it was learned subsequent to trial that the chief witness for the prosecution had submitted forged letters on behalf of himself in connection with his sentencing before this Court. Judge Wyatt found, in denying defendants' motions from the bench, that the witness' credibiltiy had been fully explored at trial, that the sending of the forged letters to this Court was merely cumulative

evidence by way of impeachment and that the newly discovered proof had no relevance to the issue with which the jury was concerned. Judge Wyatt also found "that there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion" regarding the defendants' guilt. United States v. Zane, supra at 347. In affirming Judge Wyatt's decision the Second Circuit found that "[i]t is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or nor appellants were guilty. . ." United States v. Zane at 348.

It is respectfully submitted that this Court should make the same finding as did Judge Wyatt in the Zane case as the "newly discovered evidence" here is even of less probativeness as that with which Judge Wyatt was concerned in Zane.

In any event, even assuming that Perna did not testify at all as a Government witness, the defendants would still be entitled to no relief as his testimony was completely corroborated by Anthony Verzino, who the jury obviously believed. United States v. Sperling, 506 F. 2d 1323, 1332-34 (2d Cir. 1974). And, contrary to defendants' claims, there was indeed substantial documentary corroboration as well as testimonial corroboration independent of Perna's testimony, that the defendants were what the jury found them to be, i. e., large scale heroin traffikers.

13. Defendant Bolella alleges he is entitled to a judgment of acquittal on Counts Two and Three, counts on which the jury was unresolved. When the jury is hung, the defendant may be retried.

M-1159

14. Defendant DeLutro's other contentions have already been decided against him during the trial and should again be rejected for the identical reasons.

DOMINIC F. AMOROSA
Assistant United States Attorney

Sworn to before me this

day of , 1975.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-v- :

JOSEPH MAGNANO, et al., :

Defendants. :

----------x

ORDER

S 75 Cr. 687 (IBC)

This matter having c[illegible] before the Court on a motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure by defendants Magnano, Pallatta, Bolella and De Lutro and the Court having examined the three statements of Government witness Mario Perna given to representatives of the Federal Bureau of Investigation in October 1974, which are the subject matter of the motion, and the Court having found that the contents of these statements became known to the Assistant United States Attorney in charge of the prosecution approximately two weeks after the verdict when he thereupon informed the Court and all counsel of their existence, and that there was no deliberate suppression of these materials on the part of the Government, see Giglio v. United States, 405 U.S. 150,153-54 (1972); United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973), and that the statements would not have produced a different verdict if they had been

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available at trial, and that there is not a significant chance that the statements could have "induced a reasonable doubt in the minds of enough jurors to avoid a conviction, "United States v. Seiio, 514 F.2d 1357, 1364 (2d Cir. 1975); United States v. Kahn, supra; United States v. Stofsky, Docket No. 74-1860 (2d Cir. Nov. 7, 1975) slip op. 515, 525, and that the statements, if of any value at all, were only cumulative on the issue of credibility and that they had no bearing on the issue of whether or not the defendants were guilty, United States v. Zane, 507 F.2d 346, 348 (2d Cir.), cert. denied, 421 U.S. 910 (1975), and that Government witness Mario Perna's testimony was corroborated at trial by the testimony of other witnesses documents and a tape recorded conversation, United States v. Sperling, 506 F.2d 1323, 1332-34 (2d Cir. 1974), and the Court recognizing that "in the interests of according finality to a jury's verdict, a motion for a new trial based upon previously-undiscovered evidence is ordinarily not favored and should be granted only with great caution, United States v. Costello, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958); United States v. Sposato, 446 F.2d 779 (2d Cir. 1971) United States v. Stofsky, supra

at 523, it is or this 6th day of JANUARY 1976, ORDERED that defendants' motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure be and is hereby DENIED.

Dated: New York, New York

JANUARY 6, 1976

UNITED STATES DISTRICT JUDGE

REQUEST NO. 8

PINKERTON CHARGE
(To be given only if
Defense objection is overruled)

There was no testimony that the defendant RICHARD BOLELLA was present or actually participated in the alleged narcotic transactions with which he is charged in Counts Two, Three and Four of this indictment.

Therefore in determining whether he is guilty or not guilty of those charges you must first determine whether

(1) The crimes charged in Counts Two, Three and Four of the indictment were actually committed; that

(2) That the crimes charged in those counts were committed in furtherance of the conspiracy

(3) And that at the time of the commission of those crimes the defendatn RICHARD BOLELLA was a member of the conspiracy charged in Count One of this indictment.

If you are unable to find that the Government has proven beyond a reasonable doubt any one of these three elements, then you must acquit the defendant BOLELLA of the charges set forth in Counts Two, Three and Four.

United States v. Sperling, 506 F.2d 1323, 2342, 1343 (2d Cir. 1974)

Pinkerton v. United States, 328 U.S. 640 (1946)

mdlt 40

the objective of the conspiracy, and that means they intended to go ahead, they didn't abandon the conspiracy. They took an overt, tangible step with regard to it. That shows intent to fulfil or carry out the conspiracy.

Have I made that clear?

JUROR #12: Yes, sir.

THE COURT: Now we go --

JUROR #3: I have a question about that, too.

If someone decided to be a part of a conspiracy then that person is held responsible for all the overt acts listed in that indictment, is that right?

THE COURT: Right, ma'am.

JUROR #3: But is there any pull over to the substantive counts?

THE COURT: I'm coming to that. I'm coming to that. You're smart. I'm giving you more than a passing mark. I am giving you a high mark. I hope you will at least give me a passing mark, that's all I ask for.

Now we come to the overt acts. We come to the third element now of the conspiracy count that you must consider and that must be established beyond a reasonable doubt, like each of them, and that is whether an overt act took place, whether there actually was a telephone call made in the crude example I gave you.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

mdlt 51

Counts 2, 3 and 4 of the indictment charge Joseph Magnano, also known as "Joe the Grind," Frank Pallata, also known as "Bolot," also known as "Nose," Richard Bolella, and five others who are not on trial, with the substantive offense of distribution of heroin and possession with intent to distribute heroin.

There is another way that you may find these defendants guilty of these three substantive counts besides under the principles I have just given you relating to aiding and abetting. You remember what I told you yesterday about aiding and abetting?

If you find that a conspiracy to distribute heroin existed, that these three defendants were members of it, and that the offenses charged in Counts 2, 3, and 4 were actually committed by another member of the same conspiracy in furtherance of the overall plan, you may find these three defendants guilty of these substantive offenses even if they were not physically present at the time that the offenses were committed.

In other words, if you find beyond a reasonable doubt that the persons identified as "Skooch" and "Charlie" were members of a conspiracy to distribute or sell heroin along with Magnano, Pallatta and Bolella, you may find Magnano, Pallatta and Bolella guilty of these three counts

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

mdlt 52

if you determine that Scotch or Charlie physically distributed the heroin in furtherance of the conspiracy.

The same principle applies with respect to Count 9. This count charges the defendant Soldano and another person who is not on trial, Joseph Malizia, with distributing and possessing with intent to distribute three kilograms of heroin.

You will recall that government witness Verzino testified that Soldano sold him this heroin and that the actual delivery took place in Queens, New York. Queens, New York is not in the Southern District of New York.

You may find Soldano guilty of this charge, however, if you find beyond a reasonable doubt that he was part of the conspiracy to distribute heroin along with Verzino and that he sold this to Verzino and that Verzino took the heroin to the Southern District of New York, which includes Manhattan and the Bronx, with the intention of distributing it.

In other words, if you find that Soldano was a member of the conspiracy charged along with Verzino, that he gave the heroin to Verzino, and then that Verzino took it into the Southern District of New York with the intention of distributing it, you may find Soldano guilty of Count 9.

Now, let me double check your notes.

mmbr 3

Honor's remarks this morning, one concerning your Honor's instruction as to the doctrine of actual or constructive possession. I take exception to the Court's remarks in that regard.

I don't feel that your Honor should have charged on the doctrine of constructive possession. I don't think your Honor sets forth the parameters of what constructive possession is.

THE COURT: You feel I should add constructive possession?

MR. EPSTEIN: I feel you should have deleted it, and I so requested it of your Honor yesterday.

THE COURT: What else?

MR. EPSTEIN: I also take objection to your Honor's charge as to Pinkerton. Your Honor should have instructed as I set forth in my request.

You repeat what you said yesterday with the same force and effect.

MR. HOFFMAN: I join in those exceptions on behalf of Mr. Lucas, your Honor's instruction that the determination of whether or not an individual is part of a conspiracy should be made on the totality of the evidence. That is not the law and I except to that.

THE COURT: Mr. Chance, your hand is up?

defendant Pallatta, ready?

MR. GOLDBERG: No, your Honor.

There have been motions made, and we would ask for a ruling on those motions and ask for argument on those motions.

THE COURT: The request for argument is denied. The Court has already ruled and filed with the Clerk a denial of all those motions. That was done yesterday.

MR. GOLDBERG: I see. Then the defendant is ready for sentencing, your Honor.

THE COURT: Yes, sir.

Mr. Gilbert Epstein, on behalf or defendant Bolella.

MR. EPSTEIN: Prior to proceeding with sentence on behalf of Mr. Bolella, in view of your Honor's pronouncement regarding the Court's rulings regarding his motions, I would request the opportunity to see the pre-sentence report prepared by the Probation Department here in our District Court in the Southern District in order to afford me the opportunity as Mr. Bolella's counsel to look over the report and comment on those things and the report which I believe need comment upon.

THE COURT: The application is denied for the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

simple reason that the Court will point up each and every point that we take into consideration on the sentence.

MR. EPSTEIN: I respectfully except.

Thank you, your Honor.

THE COURT: There are no other factors other than those that I shall announce which enter into the Court's deliberation.

Mr. Uviller, are you here instead of Mr. Joseph Panzer for the defendant DeLutro?

MR. UVILLER: Good morning, your Honor.

THE COURT: I am glad to see you again.

MR. UVILLER: It has been almost twenty years since I was in your courtroom.

THE COURT: Has it been that long?

MR. UVILLER: Yes, Judge.

THE COURT: How have things been with you?

MR. UVILLER: Excellent, sir.

THE COURT: I am delighted to hear it.

MR. UVILLER: I have been retained to look over this record for possible appellate reasons. I don't believe Mr. Panzer is here today representing defendant.

THE COURT: Where is he? Oh, there he is.

All right.

Now we come to Mr. Blossner.

MR. JOSEPH PANZER: Your Honor, may I make a statement before your Honor goes further?

THE COURT: Certainly, sir.

MR. JOSEPH PANZER: In line with Mr. Gilbert Epstein's request to see the probation report, I would also ask the Court in spite of what your Honor said that you will point out all the facts, I feel that the defendant DeLutro should be given an opportunity to see the probation report together with myself so that in the event there are any inconsistencies, or misstatements in that probation report, and he needs time to prove the falsity of these statements, he should be given that opportunity, because the Court has a probation report made by a probation officer.

However, it has been my experience over many years that in many instances probation officers do make mistakes, and I believe your Honor knows that. And I feel that some mistakes would require time to prove that they were mistakes.

So I again reiterate Mr. Gilbert Epstein's request and ask the Court prior to sentence to allow me as counsel for Mr. DeLutro to see the probation report in regards to Mr. DeLutro. Most respectfully, Judge.

THE COURT: The application is denied. It

calls for a more elaborate comment by the Court which I am not going to hesitate to place upon the record, and that is simply this:

That we regarded always the reports of the Probation Department to the Judge as confidential documents. It has been my invariable practice when I take into consideration some factors that were not revealed upon the trial, or not brought to my attention and to the attention of counsel and the defendant himself, to make mention specifically of those factors so as to give counsel an opportunity, and the defendant, an opportunity to meet what the Court considers is new material called to the attention of the Court.

In this case, however, I have already said, and I repeat, I shall bring out the factors which the Court is considering and only those factors which enter into our deliberations on this sentence.

For instance, in a couple of the reports there is the allegation that the defendant was deeply involved in loan sharking. I do not and will not give that any weight whatever.

MR. JOSEPH PANZER: Thank you, your Honor.

THE COURT: Now, just a second. When it goes your way, oh, there is nothing, nothing in life that begins

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. - 791-1020

to compare with the exaltation of a lawyer who gets a favorable ruling. And, on the contrary, there is always the dismal picture of a lawyer broken when the Court doesn't go along with the lawyer's reasoning.

Now let me finish. I gave that as an instance of what has always guided us. For instance, suppose I felt quite impressed with the commentary with regard to loan sharking, there wasn't a thing brought out in the course of this trial on loan sharking. What am I going to do? Conduct a hearing to see whether or not the defendant engaged in loan sharking? Am I going to give weight to an assertion made in good faith by the Government that the defendant we learned was involved in loan sharking on a significant scale? The answer is no.

You want to call the Court's attention to something that amounts to a crime? Prove it. And don't get it in that way. So that with me it has always been academic. You just throw that out, as I did here in the instance I gave you. And there have been other points that I have disregarded. And that is the reason I say that I am going to announce just what factors entered into my deliberations, and only those factors that brought about my determination.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jwh 14

greater amounts of pure heroin at the time and that he was active all the way back to the early '60s.

I don't want to speak about what they say -- that is, his associates. I don't know that that is so. And so I am not loading him down with it. I will say his associates are among the worst criminals. I don't go for it because it isn't supportive enough. And so I give that no weight. If I gave it weight, I would give him the maximum which is 60 years.

As a second offender for narcotics, federal narcotics, federal narcotics offender, you know that the sentence is double. Where it was 15 years for Magnano it becomes 30 years for DeLutro.

And so although you were convicted of only two counts and they were convicted of four you are a second federal narcotics offender. And the two counts of which you were convicted carries with it a maximum sentence that is the same as there is on four counts -- and that is 60 years and $100,000 fine.

The court imposes the following sentence:

On count 1, 25 years, on count 8, 25 years, to run concurrently, not consecutively, it being the intent of the sentence to mete out a sentence of 25 years to DeLutro.

We now come to Bolella. This defendant is 46. He

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. - 791-1020

jwh 15

was convicted of counts 1 and 4. The jury disagreed as to counts 2 and 3.

He has no civilian arrest record. He did desert the Army.

After apprehension, he effected satisfactory supervision and justice.

Here, too, we have a defendant whose father was a humble factory worker. America is made up of an enormous number of factory workers and they make up the backbone of America.

Employment is sketchy, unverifiable.

We have already said what the record reveals with regard to Bolella and we incorporate at this point everything that has been said with regard to this entire case as being applicable to this particular defendant's sentence.

MR.EPSTEIN: Excuse me, your Honor. I apologize to the Court for interrupting, but your Honor's remarks about Mr. Bolella's employment being unverifiable comes as somewhat of a surprise to me. Mr. Bolella's last employer, Mr. Charles Valentine, is here in court at the present time. Mr. Bolella's employment with Mr. Valentine over the years I would say from 1965 through 1974 have all been verified by W2 income tax withholding forms. And Mr. Valentine was interviewed by the Probation Department as well as by Mr.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jwh 16

John Wright, the gentleman I engaged.

MR. AMOROSA: That may be so, your Honor, but the government has information that those records are a sham and a fraud.

THE COURT: That is the answer. And that is what we go by in the report by the probation of the defendant.

However, in reciting that, I want you to know that the weight given to that particular factor is small at best, but it is a part of the recital that a judge should make when he goes into a sentence.

But let me pause for a moment and get the full report so that I will not be doing an injustice consciously. Please be patient.

(Pause)

MR. BLOSSNER: Might I request the Court for a recess?

THE COURT: You want it?

MR. BLOSSNER: Yes, sir.

THE COURT: You have got it.

Marshal, it may impose a heavy burden on you, but I think I ought to honor the request.

(Recess)

THE COURT: Mr. Epstein, you are on your toes, as you should be, and I am grateful to you because you are

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jwh 17

correct. What I meant to say, and what is revealed after I looked at the Probation report, is that the Probation Department was unable to verify any of the employments, but the Probation report does say the defendant worked for Charles Valentine, the manager of Park Auto Sales, 3586 Boston Road, Bronx, who reports that since '72 Bolella worked for him as a used car salesman earning $330 weekly.

From approximately '63 to '72 Bolella claims similar automobile industry related employment with a series of Bronx, New York firms.

Previously, and since leaving school, Bolella was employed as a truck driver and factory worker. So that there was no recital that they verified it. And it is not your fault that they didn't. That is their job.

And so I am not holding it against him. I am accepting this statement and your own comments with regard to his employment. And I order stricken from the record my comment that in his case I have been put on notice that his employment was a sham and a fraud.

MR. EPSTEIN: Thank you, your Honor.

THE COURT: In his case, I am constrained and do impose a sentence which is to read as follows -- as you know, the maximum for each of the counts of which he was convicted, counts 1 and 4, is 15 years and $25,000 fine.

jwh 18

The court imposes a sentence as follows:

Ten years on count 1; ten years on count 4; to run consecutively and not concurrently, the court intending by this sentence to impose a sentence of 20 years.

MR. EPSTEIN: Excuse me, your Honor.

THE COURT: Yes, sir.

MR. EPSTEIN: In view of the sentence that is imposed and in view of your Honor's statements I would ask your Honor to consider imposing a sentence under Title 18, Section 4208(2). I know your Honor's feeling in the matter, as your Honor has expressed on this occasion with regard to Bolella, as well as others, but as I think your Honor recognizes, and as other judges recognize, 4208(2) grants the Parole Board the full scope of their discretionary powers under their guidelines.

THE COURT: I would like a separate memorandum. You submit it on additional papers.

And that goes for every defendant.

MR. EPSTEIN: Very well, your Honor.

THE COURT: I must say this defendant is placed on special parole for the term of three years. I would like him to know, and I would say it again in the presence of all of them, he is to remain here. I want to say a few word to him and to the other defendants with regard to their

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FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

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1972 Sentencing Study for the Southern District of New York

By WHITNEY NORTH SEYMOUR, JR., *New York City*

The author made this study while serving as United States Attorney for the Southern District of New York. He urges action to eliminate alleged disparities in sentences being meted out in our Federal courts. This is an area of our criminal law which has evoked interest and discussion among our members.

Introduction

RELIABLE INFORMATION CONCERNING sentencing practices in the Federal courts is woefully inadequate. Some generalized figures are available through Reports of the Administrative Office of the United States Courts, but these are of limited utility. Recently, more particularized information has become available through the statistical study published by the Federal Bureau of Prisons for the fiscal years 1969–1970, which provides some new insights into the sentencing disparities between individual districts. Within each Federal district, however, there is no regular compilation of data upon which one can assess the fairness of the sentencing process. In the Spring of 1972, the United States Attorney's Office for the Southern District of New York undertook to conduct a detailed case-by-case study of all sentences imposed in the district over the course of a six-month period. The following report is largely based on an analysis of all such sentences imposed during the period from May 1, 1972, through October 31, 1972. The information was supplied by individual Assistant U. S. Attorneys in charge of the respective cases and therefore is subject to possible human error, but is believed to be essentially complete. The study covers the sentencing of 643 individual defendants. Although this is a good sample for most purposes, in the case of the analysis of sentencing patterns for specific violations or the action of specific judges, the sample sometimes becomes quite small, so that one cannot rely entirely on generalizations drawn from some of the detailed data. Nonetheless, the overall results are significant and the conclusions essentially sound.

The United States Attorney's Office is particularly indebted to three of its talented research assistants, Mrs. Poppy Quattlebaum, Federico Virella, and Richard Weisberg, for their many hours of hard work in putting together the data on which this study is based.

It should be emphasized that the recommendations set forth at the end of this study are made on behalf of the United States Attorney's Office for the Southern District of New York and do not necessarily represent the views of the Department of Justice.

Other Recent Studies

In June, 1972, the National Institute of Law Enforcement and Criminal Justice submitted a report to the U. S. Senate Subcommittee on Criminal Law and Procedure (McClellan Committee) reporting on sentencing variations in the Federal Courts, based on a computerized study of sentences imposed during the four-year period from 1967 to 1970. The Institute concluded that there are "considerable variations in sentence

A196

length" in the U. S. District Courts which occur both between districts and within districts. Part of the study focused on variations in sentences according to the race of the defendant. Among the more remarkable findings was that 28% of white defendants convicted of interstate thefts were sentenced to prison during the four-year period, while 48% of black defendants convicted of the same offense were sentenced to prison. For postal theft, the imprisonment rate was 39% for white defendants and 48% for black defendants. In other categories of offenses the variation between racial groups was not so significant, although the study concluded:

> "The percent of Black defendants given prison sentences is higher than the percent of White defendants, for all crimes except Income Tax Violation; the percent of Other defendants given prison sentences is even higher than the percent of Black defendants, for the same crimes."

The Statistical Report of the Federal Bureau of Prisons for Fiscal Years 1969 and 1970 disclosed that out of all prisoners sentenced to Federal prisons during the fiscal year ending June 30, 1970, the average sentence for whites was 42.9 months, while for blacks it was 57.5 months—more than a year longer on the average. In the preceding fiscal year, the average sentence was 42.6 months and 52.9 months, respectively, a spread of 10 months.

Discrimination in Sentencing

Our study does not support the conclusion that there is a differentiation in sentencing in the Southern District of New York as between black and white defendants charged with the same offense. There does, however, appear to be a form of indirect discrimination growing out of the different treatment of offenders for different classes of violations. There are plain indications that white collar defendants, predominantly white, receive more lenient treatment as a general rule, while defendants charged with common crimes, largely committed by the unemployed and undereducated, a group which embraces large numbers of blacks in today's society, are more likely to be sent to prison. If these indications are correct, then one may conclude that poor persons receive harsher treatment in the Federal Courts than do well-to-do defendants charged with more sophisticated crimes. Many individual judges in this district have made a conscientious effort to overcome this disparity and equalize the treatment of defendants, but these efforts, unfortunately, are not universal throughout the court.

Disparity in Sentences Between Offenses

During the six-month period covered by the Southern District of New York sentencing study, defendants convicted of white collar crimes stood at 36% chance of going to prison; defendants convicted of non-violent common crimes stood a 53% chance of going to prison; and defendants convicted of violent common crimes stood an 80% chance of going to prison.

Turning to specific violations, the study revealed that 100% (8 out of 8) of those convicted for the *theft* of securities received prison terms (with an average sentence of *two years and 8 months* for those with no prior criminal record); while only 66% of those convicted for securities *fraud* (6 out of 9) received prison sentences (with an average term of *one year and 7 months* for those without prior criminal records). The average sentence for those convicted of income tax evasion (5 out of 10), with no prior record, was *two months;* the average sentence for those convicted of inside theft of mail (14 out of 32), with no prior record, was *five months* (the average amount of tax evaded was $24,000, while the average amount stolen from the mails was $200).

Annexed hereto as Exhibit "A" is a schedule showing the likelihood of a prison sen-

A177

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EXHIBIT A

Disparity in sentencing patterns between different types of offenses, and between SDNY and the national average for Federal Courts

Offenses	Likelihood of Imprisonment		Average Length of Prison Sentences	
	SDNY *	All Federal Courts **	SDNY *	All Federal Courts **
Bail Jumping	66.7%	66.2%	10.0 months	25.6 months
Bank Embezzlement	23.2%	19.5%	18.0 months	21.3 months
Bank Robbery	82.8%	91.8%	69.6 months	124.1 months
Bribery	25.0%	42.5%	11.0 months	15.1 months
Counterfeiting	51.7%	53.7%	14.8 months	40.3 months
Forgery	41.6%	42.8%	16.8 months	32.0 months
Gambling	37.2%	29.9%	3.3 months	14.5 months
Guns	50.0%	45.3%	28.2 months	32.1 months
Immigration	50.0%	42.8%	2.5 months	6.4 months
IRS	35.4%	36.5%	5.9 months	10.4 months
Interstate	54.8%	43.7%	18.1 months	33.8 months
Narcotics	77.0%	70.6%	62.4 months	46.4 months
Perjury	50.0%	53.0%	5.2 months	28.0 months
Postal	44.3%	40.7%	18.8 months	32.5 months
Embezzlement	43.7%	19.0%	5.0 months	11.6 months
Other	46.3%	47.3%	20.1 months	50.5 months
Rackets & Extortion	55.5%	47.1%	46.2 months	31.2 months
Securities	70.4%	55.4%	31.8 months	38.7 months
Fraud	66.7%	21.5%	20.5 months	—
Theft	100.0%	57.4%	36.5 months	38.7 months
Selective Service	63.3%	27.8%	12.4 months	22.2 months
Totals ***	43.8%	43.8%	35.2 months	38.1 months

* Figures for SDNY are based on sentence imposed during six-month period from May–October, 1972.

** Figures for all Federal Courts are based on sentences imposed during the fiscal year ending June 30, 1972 and are from the Annual Report of the Annual Report of the Director of the Administrative Office of the United States Courts. Cases for SDNY are grouped according to classification of offenses as best as can be determined from the data given in the report.

*** Figures in the "total" section include all the crimes committed in both the SDNY and the Federal Courts for the above period which were not enumerated in the chart.

tence for defendants convicted of different types of offenses, and also the variations in average length of sentences imposed in cases where the defendant is sent to prison. These disparities are shown both for sentences imposed in the Southern District of New York during the six-month study period, and also the comparative national averages for the fiscal year ending June 30, 1972. It will be seen that the chances of being sent to prison in the Southern District of New York range from 23% for bank *embezzlement*, to 83% for bank *robbery*. (The national average is 20% and 89%.) The defendant convicted of *bribery* faces only a 25% chance of imprisonment in the Southern District compared to 55% if he were convicted of *interstate theft*. (The national figures are 27% and 42%, respectively.) Not only is the likelihood of going to prison much higher for certain offenses, but the average prison sentence itself is also markedly different. The average prison sentence in the Southern District of New York was 18 months for bank embezzlement; 69 months for bank robbery; 11 months for bribery; and 18 months for interstate theft. Happily the record of the Southern District of New York is substantially better than the rest of the country in many respects.

Disparity in Sentencing between Individual Judges

The practice of "judge shopping" has been halted in the Southern District of New York by a system of assigning cases by lot. But the underlying evil has not been eliminated. The chances of a defendant going to jail are still largely determined by which judge his case is assigned to. Different judges have different personal views about different violations, and permitting these differences in personal opinion to control sentencing largely destroys the ideal of evenhanded justice for the individual defendant.

The wide disparity in personal sentencing practices can be most easily demonstrated in Selective Service violations. Because of the similarity in the nature of the cases, it is possible to analyze the sentencing philosophy of each District Court Judge by studying how he has handled the sentences in the cases before him. Such an analysis is annexed hereto as Exhibit "B". In order to insure an adequate statistical base, the study period for these cases was extended to three years (even so, the sample in some cases is obviously too small to generalize). It would clearly be impossible to explain to the parents of a boy who has been sent to prison by Judge "W", and would not have been if his case had been assigned to Judge "C", that the present system is fair and just.

On the off-chance that the special nature of Selected Service cases, which often generate heated views in many quarters, might not be typical of the whole, we also conducted a five-year study of sentences imposed on postal employees charged with postal thefts with similar results. By definition, such cases are essentially similar both on the facts and on the backgrounds of the defendants. The results are set forth in Exhibit "C". Any such defendant assigned to Judge T stood a 50–50 chance of going to prison, while if he was assigned to Judge AA his chances were only 1 in 25.

EXHIBIT B

Likelihood of a prison sentence in Selective Service cases in the SDNY based on a three-year sampling (1970–1972).

Judge	Percentage of Imposition of Prison Sentence	Total Number of Defendants Sentenced
A	60%	5
B	33%	6
C	0%	6
D	50%	2
E	50%	2
F	80%	5
G	75%	4
H	50%	4
J	40%	5
K	0%	1
L	100%	1
M	15%	13
N	0%	2
O	33%	6
P	33%	9
Q	50%	2
R	0%	2
S	40%	5
T	57%	7
U	0%	4
V	0%	1
W	100%	10
X	60%	5
Y	0%	3
Z	0%	2
Total	41.8%	112

Notes: Letter code designates judges selected at random. The study covers all convictions during the years 1970, 1971, 1972.

Disparity in Sentencing between Districts

The National Institute's 1972 study for the McClellan Committee, referred to above, found a wide spread between the average sentences among the 93 Federal districts, and concluded that ". . . [The] length of sentence which a defendant can expect is very much dependent upon which district he happens to be tried in."

Based on average sentences, a person convicted of forgery in the Southern District of New York will receive twice as long a sentence as one convicted in the Northern District of New York. Likewise, a person convicted of interstate transportation of a stolen

A199

EXHIBIT C

Likelihood of a prison sentence in inside postal theft cases against postal employees in the SDNY based on a five-year sampling (1967–1971). (Listing only judges with 10 or more cases.)

Judge	Percentage of Imposition of Prison Sentence	Total Number of Defendants Sentenced
A	26.3%	19
B	17.9%	28
C	11.4%	70
D	—	—
E	19.0%	21
F	—	—
G	39.1%	23
H	28.6%	28
I	—	—
J	19.4%	31
K	29.7%	37
L	—	—
M	—	—
N	29.2%	24
O	20.5%	39
P	23.6%	34
Q	27.8%	36
R	25.0%	48
S	10.7%	28
T	50.0%	24
U	16.7%	12
V	—	—
W	10.6%	47
X	32.4%	71
Y	7.8%	13
Z	34.0%	53
AA	4.0%	25
BB	12.5%	32

Notes: Letter code designates judges selected at random. The study covers all convictions during the years 1967, 1968, 1969, 1970, and 1971.

motor vehicle in the Southern District of New York will receive a 50% higher sentence than a person convicted in the Northern District of New York. If he has the misfortune of being convicted in the Eastern District of New York, the sentence will be more than double that of the Northern District of New York. On the other hand, a defendant convicted of a Selective Service violation in the Southern District of New York will receive a sentence of less than one-third as long as in the Northern District of New York. An analysis of these disparities in length of prison sentences between individual districts in the Second Circuit is annexed hereto as Exhibit "D".

A similar analysis of variations between Circuits for the same offenses is annexed hereto as Exhibit "E". The range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia Circuit. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit. For Selective Service Cases, the extremes are 28 months in the First Circuit and 46 months in the Tenth Circuit.

Disparity in Sentence Between Individual Cases

The following synopsis of selected individual cases in which prison sentences were imposed during the six-month study period graphically illustrates the basis for the sense of injustice on the part of individual defendants at the difference in sentencing of white collar and common criminals. Other, more extreme, examples can be found in a larger period of time, but these are sufficient to make the point. All of these cases involve defendants with no prior convictions:

Case 1. Defendant A, a Caucasian male in his mid-forties and vice-president of a Wall Street brokerage firm, was charged with securities fraud by violating Regulation T and the margin requirements established by the Federal Reserve System. The amount involved in the transactions reached the sum of $3 million of excess credit, on which the defendant personally realized unlawful commissions of a good many thousands of dollars. Upon his plea of guilty, defendant A was ordered to pay a fine of $6,000.

Case 2. Defendants B and C, father and son, were charged with income tax evasion for concealing $100,000 in income over a three-year period. Defendant B, a widower, is a 65 year old Caucasian male and his son,

EXHIBIT D

Disparity in average length of prison sentences for selected offenses within the Second Circuit during fiscal year ended June 30, 1970 (from Federal Bureau of Prisons Statistical Report, Table B-9) (in months).

Second District	Forgery	Stolen Motor Vehicles	Selective Service	Robbery
Connecticut	18.8	44.4	40.0	142.3
NDNY	15.0	20.9	48.0	68.0
EDNY	37.4	51.0	40.7	152.3
SDNY	32.9	30.7	14.0	100.0
WDNY	21.0	43.2	20.8	66.0
Vermont	24.0	40.0	48.0	—
Circuit Average	31.6	35.9	33.7	122.2

defendant C, is a 35 year old Caucasian who is married and has a family. Both defendants are self-employed, earning $40,000 and $20,000 a year, respectively. Defendants B and C pleaded guilty and made restitution of the back taxes owed. Both were directed to pay fines of $2,500.

Case 3. Defendant D, a fifty year old Caucasian male, was employed by the IRS as a Special Agent. While in the process of carrying out his official duties D accepted a bribe in the amount of $3,000 and was arrested shortly thereafter. D, who is married and has a family, cooperated with the authorities and testified against two other agents resulting in their convictions. After pleading guilty to the charge, D was placed on unsupervised probation for one day.

Case 4. Defendant E, a 64 year old Caucasian male and doctor of medicine, with yearly earnings of $60,000, was charged with concealing $80,000 income over a three-year period. The defendant pleaded guilty, paid all taxes due, and was ordered to pay a fine of $10,000.

Case 5. Defendant G, a 40 year old Black male, had served in the Armed Forces for over fourteen years where he earned the Bronz Star. G was arrested and charged with the transportation in interstate commerce of stolen U. S. Treasury checks valued at

EXHIBIT E

Disparity in average length of prison sentences for selected offenses between circuits throughout the United States during fiscal year ended June 30, 1970. (From Federal Bureau of Prison Statistical Report, Table B-9) [in months].

Circuits	Forgery	Stolen Motor Vehicles	Selective Service	Robbery
1st Circuit	32.4	22.3	28.3	106.3
2nd Circuit	31.6	35.9	33.7	112.2
3rd Circuit	30.7	37.9	33.5	132.5
4th Circuit	34.3	35.9	42.5	185.3
5th Circuit	37.0	37.0	39.7	177.8
6th Circuit	37.3	32.4	40.0	143.1
7th Circuit	38.2	35.5	31.4	137.9
8th Circuit	32.0	36.7	39.6	157.9
9th Circuit	34.7	41.6	28.6	131.3
10th Circuit	48.7	41.8	46.7	146.1
D.C. Circuit	82.0	—	—	330.0
National Average	36.4	37.3	35.7	148.2

A 201

$13,000. The defendant, who is married and has a family, had been arrested on a gun violation on a prior occasion but had no record of convictions. Defendant G pleaded guilty and was sentenced to a term of imprisonment of two years.

Case 6. Defendant H, a 34 year old Black female, was the accomplice of defendant G in the transportation of the $13,000 worth of stolen Treasury checks in interstate commerce. H, who had prior arrests but no convictions, was unemployed and receiving welfare payments for herself and her three children at the time of the crime. Like G, defendant H, pleaded guilty to the charge. She was sentenced to serve six months in prison.

Case 7. Defendant I, a 31 year old Caucasian male, broke into a post office at night and stole $20,000 worth of stamps. Upon his plea of guilty, defendant I was sentenced to prison for four years.

Summary and Recommendations

The study of sentences in the Southern District of New York underscores the need for a more even-handed approach to the sentencing process. The irrational disparities referred to here are not abstract numbers but real flesh and blood problems involving the sense of justice and fair play of individual human beings. Fairness in sentencing is absolutely basic to any system of justice. As expressed in the recent final report of the New York State Special Commission on Attica, headed by Dean Robert B. McKay of NYU Law School:

> Experience with the inequities of bail, with plea bargaining, adjournment, overworked defense attorneys, interminable precedence delays, and *disparities in sentences* imposed for identical offenses leave those who are convicted with a deep sense of disgust and betrayal. If the criminal justice system fails to dispense justice and impose punishment fairly, equally, and swiftly, there can be little hope of rehabilitating the offender after he is processed through that system and deposited in a prison . . . [Emphasis added.]

Most of us connected with the Federal courts share a belief that the Federal system is the best in the country. But it is clear from the findings of these recent sentencing studies that the Federal system is not immune to apparent inequities in the treatment of individual defendants. For those of us concerned with maintaining the excellence of the Federal system, the need for effective reforms is clear. But the importance of corrective action goes far beyond the Federal system itself. Because of the presence of Federal District Courts in every state in the nation, the Federal judicial system should also be setting an example of fairness and impartiality to which state and local judges might aspire. Leadership from the Federal bench could contribute significantly to the elimination of disparity of sentencing in all courts in all parts of the country.

The following recommendations recognize the fact that any system of sentencing must be tailored to the individual defendant in the individual case. The goal in sentencing should not be uniformity in every sentence that is imposed, but rather a uniformity in policy and overall approach, with the specific sentence tailored to fit the facts of the particular case and the personality of the individual defendant. The individual variations in sentencing, however, should be rational and based on recognized standards, and not merely reflect the personal predelictions of the individual judge toward the offense or his particular attitude toward corrections.

A. Short-Range Goals

1. It is recommended that reports containing detailed data on sentences imposed in each district be compiled on a quarterly basis under the supervision of the Circuit Council, indicating the individual sentences imposed by each District Judge, together with sufficient information to permit an in-

telligent appraisal of the sentence under the circumstances of the case. Possibly a uniform system might be developed to show the weight given to various factors in arriving at the final sentence. These quarterly reports should then be circulated to every judge in the district for his own self-education and also as a basis for informal discussions between himself and his colleagues.

2. Annual sentencing institutes might be held within each circuit for the express purpose of discussing sentencing policies with respect to particular offenses and particular defendant personality profiles, and reviewing past sentencing patterns.

3. An annual conference on sentences might be held on the national level with focus on differences in sentencing patterns and approaches between the various circuits, with a goal of seeking common policies which can then be communicated to the individual district judges throughout the country.

B. Long-Range Goals

1. The overall approach to sentencing should be reoriented to reflect the difference between *rehabilitation* of the individual defendant and *deterrence* of others who might otherwise be tempted to violate the law. The two concepts are mutually contradictory to a large extent, and an appropriate accommodation between these two conflicting concepts must be worked out. Essentially, defendants sentenced primarily for purposes of rehabilitation should be assigned to suitable facilities and programs expressly planned and staffed to achieve rehabilitation. Defendants sentenced primarily for purposes of deterrence should be assigned to humane custodial facilities.

2. In cases where *rehabilitation* of the defendant is the paramount objective, primary reliance should be placed on two techniques: (a) deferred prosecution and immediate rehabilitation efforts for adequately motivated defendants in lieu of conventional prosecution, conviction and sentencing (b) controlled use of indeterminate sentences within maximum limits fixed by the court in each case, administered by properly qualified correction administrators, utilizing suitable facilities. This includes complete overhauling of the present parole procedures and approach, with principal emphasis placed on rewarding rehabilitation progress in accordance with objective yardsticks. We recognize that there are many objections to this approach but they relate primarily to how the concept is administered rather than to the validity of the concept itself.

3. The primary objective of *deterrence* should be focused on those deliberate and wilful crimes which might be prevented by prompt and firm detection, prosecution and sentencing (e.g., white collar crimes, extortion, narcotics trafficking). To achieve deterrence, it is recommended that a fixed sentence be imposed by the court (subject to some individual variation as appropriate) based on a percentage of the maximum sentence authorized by Congress under the statute. The term of imprisonment should be served in primarily custodial institutions, with rehabilitation services only secondary. A possible workable formula would be the imposition of one-third of the maximum sentence for the first offense; two-thirds for a second offense; and the full maximum sentence for a third or subsequent offense. In determining whether the violation constitutes a second or third offense, similar prior convictions should be taken into account. Obviously, to achieve effective deterrence, no parole should be permitted under such sentences. (Similar yardsticks might be used to fix the maximum sentence to be served where rehabilitation is the goal, permitting the administrator to discharge the defendant at any time prior to the completion of the term.) In individualizing the sentence imposed for deterrent purposes, the term obviously should be *increased* where aggravated

A 203

EDITOR'S NOTE

Pages A204 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

Case #3 - Description and Notes

Case Characteristics

Offense: Sale of heroin (21 U.S.C. § 841(a)).
Number of counts: One.
How convicted: Plea.
Age at conviction: Over 40.
Sex: Male.
Prior record: Seven convictions, three other arrests, five periods of incarceration; no offenses similar to the current offense.
Narcotics use: Some history of cocaine-sniffing; no other narcotics use reported.
Current employment: Cab driver.
Sentencing options: Fifteen years and/or $25,000; special parole term of at least three years to follow any sentence of imprisonment.

General Observations About the Data

Special parole terms are treated as supervised probation in the rank list.

Additional Information Requested

No judges indicated that they would need more information before sentencing.

Case #3 - Rank List of Sentences

Description of Sentences

Months prison	Months prob'n	Fine ($)	Special authority	Number	Notes
120	60	--	--	1	
120	36	--	--	1	
96	36	--	--	1	
84	60	--	(a)(2)	1	
84	36	--	--	1	
72	60	--	--	1	
72	48	--	--	1	
60	96	--	--	1	
60	60	--	--	3	
60	60	--	(a)(2)	8	
60	36	--	--	6	
60	36	--	(a)(2)	5	
48	120	--	(a)(2)	1	
48	60	--	(a)(2)	1	
48	36	--	--	1	
48	36	--	(a)(2)	1	
36	36	--	--	9	
36	36	--	(a)(2)	1	
24	36	--	--	1	
12	60	--	--	1	

Number of sentences ranked 46

DFA:bj
M-940

The defense has argued that as the Government has already introduced proof of prior similar acts through the testimony of the witness Verzino, any further testimony would unfairly prejudice the defendants. It is the Government position that Verzino's testimony with respect to prior acts no more prejudiced the jury against the defendants mentioned than his testimony concerning the acts charged in the indictment. This is so because Verzino's credibility with respect to the prior similar acts is no greater than his credibility regarding the crimes charged. If the jury believes Verzino with respect to his testimony on the crimes charged, they will certainly believe his testimony regarding prior similar acts. By the same token, if they disbelieve his testimony on the crimes charged, they will undoubtedly disbelieve his testimony regarding prior similar acts. Inotherwords, Verzino's testimony with respect to prior similar acts in no way buttresses his other testimony and, therefore, does not prejudice the defendants one iota more than his testimony regarding the crimes charged.

A 207

DA:ke

September 5, 1975

Honorable Irving Ben Cooper
United States District Judge
Southern District of New York
Foley Square
New York, New York 10007

Re: United States v. Magnano, et. al.
S 75 Cr. 687

Dear Judge Cooper:

This letter is being written to advise you and counsel for the defendants of several matters relating to the above-captioned case.

First, the Government will make available to all counsel on September 10, 1975, at my office at 5 P.M., along with further discovery material, copies of papers concerning co-conspirator Anthony Verzino's prior hospitalization at Bellevue Hospital Center in New York.

Secondly, pursuant to our obligation under Brady v. Maryland, 373 U. S. 83, 104 (1963), and its progeny, we hereby submit the following information:

(1) In or about January 1974 co-conspirator Mario Perna requested two persons to murder co-conspirator Anthony Verzino and supplied said persons with a shotgun and pistol for that purpose.

(2) In or about the year 1972 Perna was party to an agreement with at least four other persons to have Anthony Verzino, Susan Verzino and William Sorenson murdered in 1972.

(3) In or about the Summer of 1974, Anthony Verzino planned an escape from prison.

(4) In or about the years 1970, 1971, 1972 and 1973 Anthony Verzino and Mario Perna participated in a conspiracy, apart from the one charged here, to import heroin from France into the United States and to distribute it.

(5) In or about September 1974 Mario Perna escaped with others from the West Street House of Detention.

(6) In the year 1972-73 Perna participated in a conspiracy, apart from the one charged here, to import cocaine into the United States and to distribute it. Perna pled guilty to said offense in United States District Court in the Southern District of Florida in or about February 1974 and was sentenced to a term of imprisonment of three years.

(7) In or about late 1974 and early 1975, Anthony Verzino misrepresented certain facts to the Government concerning his participation and the participation of others in the conspiracy mentioned in paragraph 4.

(8) Subsequent to the time that Mario Perna and Anthony Verzino began to cooperate with the Government they have received money from representatives of the Government for the purposes of support and protection of their lives and the lives of their families.

Finally, the Government will make available on September 17, 1975 at 5 P. M. at my office transcripts of various tape-recorded conversations which we intend to introduce into evidence, so as to permit counsel to judge the accuracy of these transcripts in order to prevent delay at trial. Although counsel have already been given the opportunity to listen to these recordings, the Government will again play them when the transcripts are distributed.

Sincerely,

PAUL J. CURRAN
United States Attorney

By: _____
DOMINIC F. AMBROSIA
Assistant United States Attorney

A 209

BEST COPY AVAILABLE

mdlt 2

MR. AMOROSA: Your Honor, unfortunately my copy of the letter to your Honor dated July 15, 1975, does not indicate that a carbon copy was sent to Mr. Panzer. Copies were sent to nine counsel, but not to Mr. Panzer. That, of course, was an oversight on my part.

But with respect to what Mr. Panzer is saying, we will enter into a stipulation with respect to this. We are not required as a matter of law when a Brady matter comes up to divulge everything with respect to it. We said in letter form what happened in substance. All other counsel, of course, were on notice that they could have questioned Verzino with respect to these misrepresentations.

If they desire to call Verzino back to the witness stand on this, it's up to your Honor whether your Honor wants Verzino called. We will stipulate with respect to the fact that Verzino misrepresented certain facts in late 1974 and early 1975 in connection with the Atlanta heroin conspiracy.

Of course, our stipulation on our part would also include a statement as to why he misrepresented those facts.

We think that that is enough. We don't think that Verzino has to be called back to the witness stand at all, and we oppose any motion to call him back to the witness

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

mdlt 3

stand in connection with this, and we also oppose any motion to obtain the report in which Mr. Verzino misrepresented certain facts, if one exists.

I believe there is a report with respect to it. I'm not certain. But there is no question everyone was advised of this, with the exception of Mr. Panzer.

MR. E. PANZER: Judge, I don't know whether the lies entailed just going to agents or whether he lied in the grand jury. I don't know whether the lies were under oath or a matter of conversations. I am being precluded. Had I had this letter, I would have asked for this way in advance before I cross examined, and your Honor could have made a proper ruling.

Now I have to accept Mr. Amorosa's stipulation. I don't know whether it is accurate or not. That's why I am asking to see these reports and any grand jury testimony with respect to these lies, if there are any, so that I am not saying that I am not willing to enter into a stipulation with Mr. Amorosa, but I want to make sure that the stipulation is accurate. I can't do that unless he lets me see the reports and the grand jury testimony. Why should I have to rely on Mr Amorosa's word at this time? If he forgot to send me a letter he may forget other things, and I think this is very crucial.

MR. AMOROSA: Judge, Verzino did not lie in the

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FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

MR. AMOROSA: Judge, there is really nothing wrong with it.

THE COURT: Then why don't you do it?

MR. AMOROSA: I don't have the documents here to turn over to these men and we submit we don't have to turn them over.

THE COURT: Even though you blundered you don't have to do anything?

MR. AMOROSA: Mr. Panzer is now aware, without question, that Verzino misrepresented the facts to the government in connection with Stassi. If they want to call him back to the witness stand, that's your Honor's decision.

THE COURT: Will you please tell me, why don't you want to show them the material on which you base your statement? What's there? Is there something you don't think they ought to see?

MR. AMOROSA: No, sir.

THE COURT: Then why don't you say "Here it is," and be through with it?

MR. AMOROSA: I don't have it right now with me, Judge. I could certainly do that.

THE COURT: All right.

There it is. He will certainly do it. That's the end of that.

mdbr 29

have everything, because it was a mistake that all the papers in Lucas' possession were not Xeroxed at the time that Mr. Buceti wrote down the numbers.

THE COURT: But you tell me you have got that piece of paper.

MR. AMOROSA: I have got it, but what happened was Buceti took it to Cooney's office, and they are all contained in Government Exhibit 66 for identification, all the pieces of paper. Buceti takes this to Mr. Cooney's office some time in 1974. I am preparing for this trial. I go to Mr. Cooney's office, I start to look through his papers. I find this. I take it out, I start looking through it. I see the number 337-3517. I turn that card over. It is a card of Van Cortlandt Motor Inn. That's where Perna was meeting the defendant Lucas. A tremendous corroboration forour case.

THE COURT: But where is the card?

MR. AMOROSA: I have it right in here, Judge.

THE COURT: Can I see it?

MR. AMOROSA: Yes, sir.

I will hand up a card to your Honor at this time.

THE COURT: And I will give you a receipt for it. Why cannot this card that you just handed up to me,

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FOLEY SQUARE, NEW YORK, N.Y. -- 791-1020

(2) Youth Offenders. If an offender is under the age of 22 rs at the time of conviction, the court as part of its sentence y recommend that he be confined and treated in facilities estab- ed under Chapter —— for the rehabilitation of youth enders.

(3) Narcotics Addicts. If the court determines after a study by e Bureau of Corrections under section 3004 that an offender is a rcotics addict and that he can be treated, the court as part of sentence may recommend that he be confined and treated in cilities established under Chapter —— for the rehabilitation of rcotics addicts.

Comment

Existing law provides for commitment to the custody of the Attor- y General, which function has been delegated to the Bureau of isons; subsection (1) refers directly to the Bureau (renamed the ureau of Corrections).

The other two subsections deal with special cases—youths and dicts—to the correction of each of which an entire chapter of Title 18 presently devoted. The greater flexibility offered by the Code in deal- g with all offenders obviates the need for special sections on youthful enders and narcotics addicts. Special facilities for the treatment these two types of offenders are desirable, however, and subsections) and (3) permit the court to recommend incarceration in such cilities. If special facilities for any other group, such as alcoholics, e established, a similar provision could be added for them. See orking Papers, pp. 1161–63, 1318–21.

3204. Concurrent and Consecutive Terms of Imprisonment.

(1) Authority of Court. When multiple sentences of imprison- ent are imposed on a person at the same time or when a term of nprisonment is imposed on a person who is already subject to an ndischarged term of imprisonment, the sentences shall run con- urrently or consecutively as determined by the court. Sentences hall run concurrently unless otherwise specified by the court.

(2) Multiple Sentences. A defendant may not be sentenced ons cutively for more than one offense to the extent:

(a) one offens is an included offense of the other;

(b) one offense consists only of a conspiracy, attempt, solici- tation or other form of preparation to commit, or facilitation of, the other; or

(c) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

A214

lishes a maximum term of five years' imprisonment for conspiracy to commit any felony, regardless of whether the felony itself carries a penalty of 2 or 20 years; many existing statutes defining specific offenses therefore do not rely upon the general conspiracy statute and repeat the conspiracy provision in order to correlate the sentencing provisions. Subsection (6) of this section relates the penalty to the class of the offense which is the objective of the conspiracy. The Code treats conspiracy, however, as a species of multi-party attempt: the grading is comparable to that provided for attempt and, as is provided for attempt, under § 3204 one cannot be sentenced consecutively for conspiracy and the substantive crime. Although, under the general rule of § 1001, the grading of a conspiracy offense would be lower where the conspiracy had not come dangerously close to accomplishing its goals, conspiracy is punishable equally with the completed offense in the case of certain offenses in the Code, where explicit provision is made for such grading. See, *e.g.*, § 1112 (espionage).

5. *Complicity.* Subsection (5) complements a provision in the complicity draft, § 401(1)(c), reversing a judicially-developed doctrine which imposes complicity liability based solely upon membership in the conspiracy. See comment to § 401, *supra*.

6. *Codification and Clarification.* Subsections (2), (3) and (4) constitute statutory treatment of matters which have been heretofore been left to judicial development. Such codification should not be construed as abandonment of the wealth of federal decisional law on the subject of conspiracy nor as an expression of opinion as to whether procedural aspects of conspiracy trials should or should not be treated by statute elsewhere.

7. *Relation to Organized Crime.* Some opinion favors supplementing conspiracy law with a separately defined offense authorizing very high penalties against leaders of large criminal syndicates. See Working Papers, pp. 381–84; Study Draft § 1005. Proposals of this character were shelved in favor of the provisions in § 3202 authorizing use of the "upper ranges" of imprisonment for dangerous special offenders, including leaders of organized crime. This solution might have to be reconsidered if there were a disposition to change conspiracy from an inchoate offense to an independent offense, since a mere two-party agreement on crime, contemplated by § 1004, inadequately describes the large scale continuous criminal syndicate which should be the target of any such independent offense.

8. *Alternative Treatment of Conspiracy.* A substantial body of opinion in the Commission favors an alternative to subsection (6) which would read as follows: "Grading. Conspiracy shall be graded at the same level as the highest crime conduct constituting which was agreed to be performed or caused." This would reflect the view that conspiracy should be treated not only as an inchoate offense, but also as a separate crime. See Model Penal Code, Tent. Draft No. 10, p. 96 (1960); *Callanan* v. *United States*, 364 U.S. 587, 593–94 (1961). In the opinion of these Commissioners, there is insufficient justification, either in theory or experience, to warrant the approach of the text, which would narrow the scope of present conspiracy law. These same Commissioners wish to express concern that the Code would not permit the

A 215

EPSTEIN USA v. Magnano (Bolella)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 22 day of March, 19 76 at No. 1 St. Andrews Pl. NYC deponent served the within Appendix upon the U.S. Atty. So. Dist. of NY herein, by delivering a true copy thereof to ~~h~~ him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 22 day of March 1976

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976


COPY RECEIVED
Robert B. Fiske, Jr.
MAR 22 1976
U.S. ATTORNEY
SO. DIST. OF N.Y.